[HIGH COURT OF AUSTRALIA.]

THE LORD MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE } PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . . DEFENDANTS.

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MELBOURNE, *July* 15, 16.

SYDNEY, *Aug.* 13.

Latham C.J. Rich, Starke, Dixon, McTiernan and Williams JJ.

Constitutional Law (Cth.)—Legislative power of Commonwealth—Implied limitation—Interference with governmental functions of States—Banking—"State banking"—Statute—Validity—Banks not to "conduct any banking business for a State or for any authority of a State, including a local-governing authority" except with consent of Commonwealth Treasurer—Banking Act 1945 (*No.* 14 *of* 1945), *s.* 48.

Section 48 of the *Banking Act* 1945 provides that "Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority."

Held, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting), that this section was not a valid exercise of the power in relation to "banking" conferred upon the Commonwealth Parliament by s. 51 (xiii.) of the Constitution which does not authorize legislation directed to the control or hindrance of the States in the execution of their governmental functions.

Held, further, by the whole Court, that "State banking" in s. 51 (xiii.) of the Constitution means the business of banking engaged in by a State as banker and does not include transactions between a State as customer and a bank.

DEMURRER.

In an action in the High Court by the municipality of the city of Melbourne against the Commonwealth and its Treasurer, the Right Honourable Joseph Benedict Chifley, the plaintiff's statement of claim was substantially as follows :—

1. The plaintiff is and was at all material times a body corporate constituted by statute.

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2. The defendant the Right Honourable Joseph Benedict Chifley is the Treasurer of the Commonwealth.

3. By virtue of various statutes the council of the plaintiff corporation is empowered to make by-laws and regulations for the good rule and government of the City of Melbourne and for other purposes connected with the administration of the affairs of the said city, and the plaintiff is authorized to carry on and carries on various undertakings, including the City Abattoirs, the City Cattle Market, the Queen Victoria Market, the Fish Market, four public baths, a refrigerator, weighbridges and electric supply and hydraulic power supply undertakings.

4. The plaintiff also controls and maintains various properties, including the Town Hall Chambers, Eastern Market, Hay Market, Western Market and warehouses and stores at the Wharf Market and is responsible for the maintenance of park lands, reserves, streets and footways within the city limits.

5. The plaintiff also administers the *Health Acts* within the City of Melbourne, the *Uniform Building Regulations* and the licensing and control of hackney carriages and motor omnibuses within the metropolitan area.

6. In the course of the activities referred to in pars. 3, 4 and 5 hereof, the plaintiff receives sums of money amounting to upwards of £1,800,000 per annum and makes payments (including appropriations to sinking funds, reserves and payments of a like character) amounting to a similar sum.

7. For the purpose of dealing with the receipts and payments referred to in par. 6 hereof and of obtaining financial accommodation required by the plaintiff to enable it to carry on the activities above referred to it is necessary for the plaintiff to establish bank accounts and the banking business necessary and incidental to the plaintiff's activities is and has for some years been conducted for the plaintiff by the National Bank of Australasia Ltd., a body corporate specified in Part I. of the First Schedule to the *Banking Act* 1945.

8. By a letter dated 1st May 1947 from the defendant the Right Honourable Joseph Benedict Chifley to the plaintiff, which letter was received by the plaintiff on or about 2nd May 1947 the said defendant informed the plaintiff as follows:—

> "Under section 48 of the *Banking Act* 1945, it is provided that, except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local-governing authority. It is further provided by that section that, until a date fixed by the Treasurer by notice published in the *Gazette* that section

shall apply only in relation to banking business conducted for a State, or for any authority of a State specified by the Treasurer by notice in writing. A date has not yet been so fixed and I propose to specify, on or about 1st August 1947, certain authorities of a State or local-governing authorities, including the City of Melbourne, to be authorities in relation to which section 48 of the *Banking Act* 1945 shall apply. In effect this will mean that as from the date on which this specification was made a private bank will not be able legally to conduct business on behalf of any local-governing authority specified in the notice. This information is furnished for the purpose of enabling your authority to make such preliminary arrangements as are considered necessary."

9. On 13th May 1947 a letter was forwarded on behalf of the plaintiff by the Town Clerk of the City of Melbourne to the defendant the Right Honourable Joseph Benedict Chifley in the following terms :—

"Referring to your letter of the 1st instant regarding the provisions of the Commonwealth *Banking Act* 1945, I have to inform you that your communication was submitted to the last meeting of the City Council, when the council by resolution recorded its objection to the application of the provisions of the Act to the City of Melbourne, and authorized the finance committee of the council to make representations to the Honourable the Treasurer for the exemption of the council from such provisions, and to take all other steps which the committee may consider necessary with the object of enabling the council to continue its existing banking arrangements. In accordance with the decision of the council, formal application is hereby made for the exemption of the council from the provisions of the Act."

10. By a letter dated 23rd May 1947 from the said defendant to the plaintiff received by the plaintiff on or about 24th May 1947 the said defendant informed the plaintiff as follows :—

"I acknowledge receipt of your letter of the 13th May 1947, protesting against, and requesting the exemption of your council from, the operation of section 48 of the *Banking Act*. Full consideration was given to this matter before it was decided to specify your council as an authority to which section 48 of the *Banking Act* shall apply. I am satisfied that the Commonwealth Bank is in a position to provide full banking facilities to your council and I cannot see my way clear to exempt the council from compliance with the terms of the order which I propose to issue on 1st August 1947, under that section."

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11. The defendant the Right Honourable Joseph Benedict Chifley threatens and intends by notice in writing to specify the plaintiff as an authority of a State to which s. 48 of the *Banking Act* 1945 shall apply and further threatens and intends, by withholding his consent in writing to the conduct of banking business for the plaintiff by any bank other than the Commonwealth Bank of Australia to compel or to attempt to compel the plaintiff to transfer its banking business to the Commonwealth Bank.

12. The *Banking Act* 1945, or alternatively s. 48 thereof, is beyond the powers of the Parliament of the Commonwealth of Australia, contrary to the provisions of the Constitution of the Commonwealth and is void.

The plaintiff claimed (so far as is here material), against both defendants, a declaration in terms of the allegation in par. 12 of the statement of claim and, against the defendant Treasurer, a consequential injunction.

The defendants demurred to the statement of claim, and the demurrer now came on for hearing. The order in which the appearances of counsel are indicated hereunder is the order in which, at the instance of the Court, counsel presented their addresses.

Barwick K.C. (with him *Coppel* K.C. and *D. I. Menzies*), for the plaintiff. The *Banking Act* 1945, s. 48, is not a valid exercise of the power, under s. 51 (xiii.) of the Constitution, to make laws with respect to " banking, other than State banking," and there is no other power in the Constitution which will support it. Section 51 (xiii.) of the Constitution appears to be a reproduction, with additions, of the provision of *The British North America Act* 1867 which was under consideration in *Tennant* v. *Union Bank of Canada* (1). The meaning of " banking " was there considered, and its meaning in s. 51 (xiii.) received similar consideration in *Commissioners of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (2). It will be submitted that s. 48 of the *Banking Act* is not a law with respect to banking, but it is desired first to put the alternative contention that, if it is a law with respect to banking, it is one with respect to State banking and, therefore, excluded from pl. (xiii.). In the phrase " banking, other than State banking," the word " banking " must have the same meaning in both instances. It is important to observe that the power is to legislate with respect, not to " bankers," but to the functional operation of banking. Banking is a process involving two parties, banker and customer. The power to regulate

(1) (1894) A.C. 31 : See pp. 46, 47.

(2) (1914) 19 C.L.R. 457 : See pp. 465, 470.

banking is, therefore, a power to regulate both parties to the banking transaction. It follows that the exclusion of " State banking " means the exclusion of the power to regulate a State, in relation to banking, whether in the capacity of banker or customer. In form s. 48 is a prohibition directed to the banker, but in substance—and it is the substance to which one must look to see if the section is within power—it is directed as well to the customer. A customer engaging with a banker in a prohibited transaction would be liable as a principal offender (*Crimes Act* 1914-1941, s. 5). In effect s. 48 purports to prohibit a State from engaging as a customer in banking transactions except such as may be permitted under the section, the object being, as is admitted on the pleadings, to force the States and their authorities to bank with the Commonwealth Bank. [He referred to the *Commonwealth Bank Act* 1945, ss. 5, 7, 28 ; the Constitution, s. 105A.] The section, therefore, assumes a power which is excluded by pl. (xiii.). The section must stand or fall according to the extent of the power to regulate States and State authorities : As the section expressly includes local-governing authorities under the head of State authorities, there can be no question of severance. The section was drafted on the assumption that State banking meant only banking by a State as banker, as appears from s. 5 (1) of the Act, which provides that nothing in (among other provisions) s. 48 shall apply to State banking. That provision cannot avail to give s. 48 any validity, if the present argument is correct. The plaintiff's next contention assumes that the first argument is not correct, that " State banking " means only banking by a State as banker. The contention is that s. 48 is not a law " with respect to " banking, at all, within the meaning of s. 51 (xiii.) of the Constitution, because it discriminates against (in the sense that it is " aimed at ") the States and State authorities and provides no *discrimen* having relation to the subject matter of banking. It singles out the States simply because they are States, not for a purpose that has to do with any particular function of banking ; it is rather a law " with respect to " the States and their domestic activities. It is a general prohibition of the transaction of banking business by the States with banks not approved by the Commonwealth Treasurer. That it is directed to the " banking business " (as a whole) of a State, and does not discriminate between the various functions of banking or classes of banking transaction or seek to regulate any such function or class, is shown by sub-s. (3), which empowers the Treasurer to specify a State (or an authority of a State) in relation to its banking business as a whole or as at a particular office of a bank. It is not a law enabling the Treasurer to say that because of the banking nature of some particular

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business it ought to be conducted in one place rather than another ; it enables the Treasurer to discriminate between States (or their authorities), not between different kinds of banking business. A law with respect to banking is either a general law binding upon banks with respect to the accounts of all its customers or all their banking business, irrespective of the identity of the customer, or one which discriminates between various functions of banking, because of the nature of the business or the way in which it is conducted, or contains some other discrimination which is founded upon some banking reason. It is not suggested that a law ceases to be a law with respect to banking merely because it discriminates against a particular class of persons or entities : The nature of the class may itself disclose a *discrimen* which is related to banking. It might, for instance, be a highly desirable piece of legislation, and truly banking legislation, which singled out persons who had been convicted of passing valueless cheques and imposed special restrictions on them in relation to banking. What is suggested is that, when a law which refers to banking is discriminatory (in the sense which has been indicated), the question whether the subject matter of the law is banking is to be determined by ascertaining whether the *discrimen* has a real connection with that subject matter. If it has not, the real subject matter of the law is the class of persons discriminated against. [He referred to *John Deere Plow Co. Ltd.* v. *Wharton* (1) ; *Great West Saddlery Co. Ltd.* v. *The King* (2).]

[LATHAM C.J. referred to *Union Colliery Co. of British Columbia Ltd.* v. *Bryden* (3).]

It is not essential to the validity of this argument that those discriminated against are States of the Commonwealth ; the argument would apply with the same force if the discrimination was against, say, brewers, or persons of a particular religion. That s. 48 discriminates against the States does, however, afford the plaintiff a further argument which is founded on the proposition that under the Constitution neither Commonwealth nor State may pass discriminatory legislation aimed at the other with respect to an essential governmental function of that other. It may be that this proposition is merely part of a wider one, that the Constitution does not permit Commonwealth or State to impede the exercise by the other of its functions, whether the legislation is discriminatory or not, and whether or not the function is one which might be called " governmental." The authorities, however, show that some Commonwealth legislation of a general nature is valid notwithstanding that it affects

(1) (1915) A.C. 330.
(2) (1921) 2 A.C. 91.
(3) (1899) A.C. 580.

the States ; they also show that the vice that has been found in some legislation is that it is discriminatory. Here the States are discriminated against and impeded in relation to an essential governmental function, the disposition and control of the State revenue. The plaintiff, therefore, is not obliged to support the wider proposition or to examine its precise extent. It may be that it must be limited in some respects, perhaps by reference to the precise words of the Constitution granting particular powers. Although the old doctrine of the immunity of instrumentalities has gone, the proposition for which the plaintiff contends still remains valid and finds support in the authorities. The grant of power in s. 51 (xiii.) must be read as it appears in a constitution which provides for the union of indestructible States in an indestructible Commonwealth. Sometimes the view is taken that this creates an implication in the light of which the grant of power is to be read ; another view which finds support is that the grant of power does not include power to affect the members of the union unless expressly so stated. The result, whichever way it is achieved, is a consensus of opinion which is sufficient to support, at least, the plaintiff's proposition ; how much further it may go, the plaintiff is not concerned to establish. [He referred to *Heiner* v. *Scott* (1) ; *Pirrie* v. *McFarlane* (2) ; *Australian Railways Union* v. *Victorian Railways Commissioners* (3) ; *West* v. *Commissioner of Taxation* (*N.S.W.*) (4) ; *South Australia* v. *The Commonwealth* (5) ; *Victoria* v. *The Commonwealth* (6) ; *Pidoto* v. *Victoria* (7) ; *Victoria* v. *Foster* (8) ; *Essendon Corporation* v. *Criterion Theatres Ltd.* (9) ; *New York* v. *United States* (10).] The result is that a law such as s. 48, even if treated as a law " with respect to banking," in the widest literal meaning that can be given to those words without regard to context, is still not authorized by s. 51 (xiii.) of the Constitution, because its sole purpose and effect is to impede banking by a State in the exercise of its governmental functions.

(1) (1914) 19 C.L.R. 381, at p. 393.
(2) (1925) 36 C.L.R. 170, at pp. 184, 191, 221, 229.
(3) (1930) 44 C.L.R. 319, per *Starke* J. at pp. 389, 390 ; per *Dixon* J. at pp. 390, 391.
(4) (1937) 56 C.L.R. 657, per *Latham* C.J. at pp. 668, 669 ; per *Dixon* J. at pp. 679, 681, 683 ; per *Evatt* J. at p. 687.
(5) (1942) 65 C.L.R. 373, per *Latham* C.J. at pp. 419, 424, 430, 431 ; per *Starke* J. at pp. 441, 442, 445-447.
(6) (1943) 66 C.L.R. 488, per *Latham* C.J. at p. 505 ; per *Starke* J. at p. 513 ; per *Williams* J. at p. 533.
(7) (1943) 68 C.L.R. 87, per *Latham* C.J. at pp. 103, 106 ; per *Starke* J. at p. 116.
(8) (1944) 68 C.L.R. 485, at pp. 492, 497, 500.
(9) *Ante*, p. 1. Per *Latham* C.J. and *Dixon* J.
(10) (1946) 326 U.S. 572, at pp. 575, 580, 582 [90 Law. Ed. 326].

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Hannan K.C. (with him *K. J. Healy*), for the States of South Australia and Western Australia (intervening, by leave), adopted the argument of the plaintiff and referred, as to the meaning of "banking," to *Quick and Garran's The Annotated Constitution of the Australian Commonwealth*, p. 576; *Paget's Law of Banking*, 4th ed. (1930), p. 5; and, as to the plaintiff's final argument, to the Commonwealth Constitution, ss. 106, 107; *Commonwealth Bank Act* 1945, s. 9; *Constitution Act* 1934-1943 (S.A.), s. 72; *Audit Act* 1921-1936 (S.A.), ss. 18-23; *Constitution Act* 1889 (W.A.), s. 68; *Audit Act* 1904 (W.A.), ss. 21-29; *Attorney-General (Cth.)* v. *Colonial Sugar Refining Co. Ltd.* (1); *James* v. *The Commonwealth* (2).

Mason K.C. (with him *Tait* K.C., *W. J. V. Windeyer* and *J. D. Holmes*), for the defendants. Section 48 is a law with respect to banking other than State banking within the meaning of s. 51 (xiii.) and is, therefore, within the power conferred by that placitum. It is not disputed that, in the placitum, "banking," when used generally, and also in the expression "State banking," has the same meaning. So, by considering the meaning of "banking" generally, one ascertains what "State banking" means.

[STARKE J. referred to *Hart's Law of Banking*, 4th ed. (1931), vol. 1, p. 2.]

The true meaning of the word "banking" is "the carrying on of the business of banking." It is not denied that the business of banking involves two parties, the banker and the customer; but the customer does not carry on the business of banking; it is only a colloquialism to describe the customer as "banking" when he goes to the bank to transact business as customer. Accordingly, a State is not engaged in "State banking" within the meaning of the placitum when it engages as customer in banking transactions; the phrase means the carrying on of the business of banking by a State (or a body authorized by it) as banker. With this s. 48 of the Act has nothing to do; s. 5 expressly excludes "State banking" from the application of s. 48. It is in keeping with this conception of the meaning of banking that s. 48 is in form (and, it is submitted, also in substance) a direction to the banks, not to the customers, the States. The section is truly a law with respect to the carrying on of the business of banking. Of necessity such a law affects and binds the customer to the extent to which it hits transactions in which he might engage. That merely states the truism that a law on a given subject matter will affect a number of people. The subject matter does not change simply because the provision is said to be

(1) (1914) A.C. 237, at pp. 252-254. (2) (1936) A.C. 578, at p. 611.

" aimed at " people whose affairs it touches. The *Banking Act* sets up a system of licences for banks : See ss. 7, 8. It says in effect that no bank shall carry on business without a licence, and, in s. 48 that a second licence or permit must be obtained by a bank that wants to be a banker for a State Government. That such legislation is within the subject matter of banking follows from the decision in *Australian National Airways Pty. Ltd* v. *The Commonwealth* (1). So far as s. 51 (xiii.) is concerned, legislation, for instance, which gave the Commonwealth Bank a monopoly of all banking business other than such as was within the exception of " State banking " would be within the subject matter, just as the attempt to create an airlines monopoly was within the subject matter of pl. (i.) ; it failed, not because it was not within pl. (i.) but because of s. 92 of the Constitution. Whether s. 92 would affect a banking monopoly need not be considered here. It may, however, be observed that the Commonwealth has already taken unto itself certain monopolies which have not been challenged. [He referred to the *Post and Telegraph Act* 1901-1934, ss. 80, 91 ; *Lighthouses Act* 1911-1942, s. 10 ; *Wireless Telegraphy Act* 1905-1936, s. 4.] No question of s. 92 has been raised in this case, and it seems unlikely that the question could arise. The proper construction of s. 48 of the *Banking Act* would seem to be that it is limited to intra-State banking ; in any event, the section could be so read down if necessary. If a wine and spirit merchant who had carried on business under a licence was deprived by the law of that licence, his customers might be inconvenienced, but no right would be taken away from them. Under State law the question of subject matter could not arise, but, if it could, the law which took away the licence would not be a law " with respect to " the customers. Section 48 is directed to what may be described as the " trading banks." If s. 48 had not been enacted, none of those banks would have been bound to accept the business of a State or a State authority. A State has power to set up its own bank and impose on it such duties as it thinks fit ; but the trading banks owed the State no duty the correlative of which would be a right in the State on which s. 48 could operate so as to prejudice the State. Apart from State banks, the Commonwealth could, without infringing any legal rights of the customers, close all the banks and leave the people without any banking facilities except such as might be provided by State banks. A law to that effect would be a law with respect to banking ; s. 48 is none the less a law with respect to banking because it stops short of that. The plaintiff's contention was that the section was really a law with respect to the States because it singled them

(1) (1945) 71 C.L.R. 29.

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out and discriminated against them; in effect, that the *discrimen* was arbitrary is that the States were selected simply because they were States, and not for a reason related to banking. It can be conceded for present purposes that, if the section was discriminatory in that sense, it would not be a law with respect to banking; but it is submitted that the section is not lacking, as the plaintiff contended, in a sufficient nexus with banking. It can be assumed that the object of, or desire embodied in, s. 48 is to produce the result that all government authorities shall conduct their banking business with publicly owned and controlled banks, either State or Commonwealth; it can even be assumed that the object of the section is to "force" the States and their authorities, so far as it can be done, to bank with the Commonwealth Bank. There is a real nexus between such an object and the subject of banking because the Commonwealth Bank is established as the central bank for the Commonwealth and it is a recognized function of a central bank to act as government banker: See *De Kock* on *Central Banking*, pp. 47 et seq. The extension of this recognized function of a central bank to the accounts of States and authorities of States is within the general theory of central banking because Commonwealth and States may now be regarded as one government for monetary and public credit purposes. [He referred to the Constitution, ss. 96, 105A; *South Australia* v. *The Commonwealth* (1); *R.* v. *Brislan*; *Ex parte Williams* (2); *Huddart Parker Ltd.* v. *The Commonwealth* (3).] These considerations supply the answer to both the second and third contentions of the plaintiff, which in substance are one argument put in two aspects. In the ultimate result the argument resolves itself into a complaint that the States and their authorities are affected by a law with respect to banking. The plaintiff says, in substance: "We like dealing with such and such a bank; you are preventing us from doing so; we do not like it." It is unreal and without significance in law to suggest that the legislation has some sinister purpose or operation, to say that it seeks to "force" the States into something, to control them through their finances and to hamper their functioning. The States and their authorities, as well as private individuals, must, of necessity, be affected by the legitimate exercise of some, at least, of the legislative powers of the Commonwealth. Laws usually "affect" someone, and the States are not above the law. There is nothing unreasonable or inconsistent with the Federal structure in the proposition that in their

(1) (1942) 65 C.L.R., at pp. 420, 421, 423, 424, 429-434, 436, 458, 459, 468, 469.

(2) (1935) 54 C.L.R. 262, at p. 276.

(3) (1931) 44 C.L.R. 492, at p. 526.

dealings with banks which are subject to Commonwealth control the States must accept the consequences of that control. They are not bound to deal with the banks that are subject to that control. They can set up their own banks and create their own banking conditions. The exception of State banking is an express limitation on the banking power which is quite sufficient to protect the States from prejudice. That being so, there is no room for any implication of a further limitation. It is a reasonable assumption that the limitation which is expressed is intended to be the only limitation of the power. Moreover, it is significant that the limitation is expressed as it is: It suggests the view that State banking would have been within the subject matter of the placitum unless excluded and that, except to the extent expressed, it was not intended to give the States immunity from banking laws. In the interpretation of the Constitution it is not a correct approach to start with the assumption that every grant of legislative power to the Commonwealth must be subject to some limitation in favour of the States. So far as s. 51 is concerned, one must look first to the words of the placitum which is relevant to a given case, to the form in which the grant of power is expressed and to the nature of the subject matter. The preservation of the Federal structure may make necessary an implied limitation of a grant of a particular power which does not itself express a limitation: The implication may be necessary to prevent the States from being destroyed or prejudiced in the exercise of their governmental functions; otherwise, it would not be warranted. There is no warrant for reading any such limitation into pl. (xiii.); there is no need for it.

Reynolds K.C. (with him *T. W. Smith*), for the State of Victoria (intervening, by leave), adopted the argument of the defendants. [He referred to *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (1); *South Australia* v. *The Commonwealth* (2).]

Barwick K.C., in reply. It flows naturally from the federal structure that neither Commonwealth nor State is competent to aim its legislation at the other so as to tend to weaken or destroy the functions of the other. You do not look in any of the placita of s. 51 to find this incompetence; you get it from the federal structure. Accordingly, you do not look (as the defendants say you should) at the placitum to see whether there is room for an implication of the incompetence. You must start with the implication. The inquiry then is whether there is anything in the placitum which cuts down

(1) (1931) 46 C.L.R. 73, at p. 103. (2) (1942) 65 C.L.R., at p. 424.

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the implication. That is to say, the placitum must be read as if it contained an expression of the incompetence unless you find in the placitum something to exclude it. That being so, the defendants get no assistance from the suggestion that the exception of State banking shows that no other exception or limitation was intended. Moreover, on the assumption the defendants make that "State banking" means banking by the State as banker, the exception relates only to a trading function of a State, and there is no reservation of "governmental" functions (in the narrow sense, in which those functions are distinguished from trading functions). It would be odd if the framers of the Constitution saved State trading functions from Federal interference and left State governmental functions at the mercy of the Federal Parliament. The defendants' argument as to central banking defeats itself. What is called central banking involves holding the funds of the Government which created the central bank, but not those of another Government. The logical outcome of the argument is that the central bank for a State must be a State bank. Assuming (but not conceding) that the defendants are right in regarding central banking as a function of "banking," in the strict sense, it follows that, so far as a State is concerned, central banking is within the exception of "State banking." The plaintiff submits, however, that central banking is not a nexus, at all, between s. 48 and the subject matter of banking in pl. (xiii.). That a government uses a central bank as a medium for carrying into effect a policy of financial or monetary control or protection of public credit does not show that what the bank does as such a medium is within the subject matter of "banking." To say that "Commonwealth and States may be regarded as one government for monetary and public credit purposes" does not solve the problem here. Whatever that expression may mean, it clearly cannot mean that Commonwealth and States are to be regarded as one Government for the purposes of pl. (xiii.).

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered:—

LATHAM C.J. The demurrer to the statement of claim in this action raises the question of the validity of s. 48 of the *Banking Act* 1945. The plaintiff corporation, the Lord Mayor, Councillors and Citizens of the City of Melbourne, claims against the Commonwealth and the Treasurer of the Commonwealth a declaration that the *Banking Act* 1945 of the Commonwealth, or alternatively s. 48 thereof, is invalid. The defendants' demurrer has been supported by the State of Victoria, intervening by leave, and has been opposed by the

other intervening States, South Australia and Western Australia. The plaintiff has abandoned a claim that s. 48 of the Act is invalid on the ground that other provisions in the Act are a law imposing taxation within the meaning of s. 55 of the Constitution.

The Commonwealth Constitution, s. 51 (xiii), gives power to the Commonwealth Parliament to make laws for the peace, order and good government of the Commonwealth with respect to " Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money."

The Commonwealth Parliament in the *Banking Act* 1945, s. 48, has made the following provision :—

" 48—(1) Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority.

Penalty : One thousand pounds.

(2) Any consent of the Treasurer under this section may apply to all such business conducted by any particular bank or at a particular office of a bank, or to the business of any particular State or authority conducted by any particular bank or at any particular office of a bank.

(3) Until a date fixed by the Treasurer by notice published in the *Gazette*, this section shall apply only in relation to banking business conducted for a State or for an authority of a State, including a local governing authority, specified by the Treasurer by notice in writing, and, if an office of a bank is specified in the notice, at the office so specified." This section does not " apply with respect to State banking "—s. 5 (1).

The statement of claim alleges that the Commonwealth Treasurer has given notice that he proposes on or about 1st August 1947 to specify certain authorities of a State or local governing authorities, including the City of Melbourne, to be authorities in relation to which s. 48 of the Act shall apply. As explained in the communication of the Treasurer, " In effect this will mean that as from the date on which this specification was made a private bank will not be able legally to conduct business on behalf of any local governing authority specified in the notice." The term " private bank " is evidently intended to describe banks other than the Commonwealth Bank. A subsequent communication states that the Treasurer is satisfied that the Commonwealth Bank is in a position to provide full banking facilities to the Council. Accordingly, the position is that the Federal Treasurer proposes, by the exercise of the powers conferred by s. 48

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of the *Banking Act*, to prohibit the "private banks" from doing any banking business with the City of Melbourne corporation.

The statement of claim alleges that the Council is empowered to make by-laws for the good rule and government of the City of Melbourne and that the Council carries on various undertakings, including the City Abattoirs, the City Cattle Market, the Queen Victoria Market, the Fish Market, public baths, refrigerators, weighbridges electric supply and hydraulic power undertakings; that it manages and controls various properties, parks and the like, and administers the *Health Acts* within the City of Melbourne, the *Uniform Building Regulations*, and the licensing and control of hackney carriages. In the course of these activities the plaintiff "receives large sums of money amounting to upwards of £1,800,000 per annum and makes payments (including appropriations to sinking fund, reserves and payments of a like character) amounting to a similar sum." In order to deal with its receipts and payments the plaintiff has established banking accounts, and the banking business of the plaintiff has been done for the plaintiff by the National Bank of Australasia, which is a bank to which s. 48 applies.

The council cannot compel the Commonwealth Bank to accept its business. The effect of the specification made by the Treasurer is therefore that the Melbourne City Council will be compelled to do its banking business with the Commonwealth Bank upon terms which are acceptable to the Commonwealth Bank, or, alternatively, that it cannot conduct general banking business with any bank at all, there being no State bank in Victoria doing general banking business.

Section 48 of the *Banking Act* is applicable to the banking business of a State or of any authority of a State, including any local governing authority. The arguments which have been submitted to the Court have been directed to the validity of the provision as applying in the case of a State. It has not been argued that s. 48 may be invalid in the case of a State but valid in the case of State authorities, including local governing authorities; that is, no question of severability has been raised on behalf of the defendants. Further, the defendants have disclaimed absence of interest in the plaintiff as a ground of the demurrer, and argument was not heard on that subject. It would, I suggest, have been difficult to raise a doubt upon the matter if s. 48, instead of providing that no bank should do business for a local governing authority without a licence from the Treasurer, had provided that no local governing authority should do business with a bank which did not have such a licence. The meaning of the provision is the same in either form.

The contentions for the plaintiff are—(1) s. 48 is not legislation with respect to banking; (2) alternatively, if s. 48 is legislation with respect to banking, it is legislation with respect to State banking, and for this reason is expressly excluded from the scope of the Commonwealth power conferred by s. 51 (xiii) of the Constitution; (3) alternatively, if s. 48 is legislation with respect to banking but is not legislation with respect to State banking, it is a law which is directed against an essential State Government activity, namely the custody, control and disposition of government funds; it involves a form of what is called "discrimination," which is forbidden by the Commonwealth Constitution taken as a whole and is therefore invalid.

Before examining these arguments it is desirable to refer to some other provisions of the *Banking Act* and certain provisions of the *Commonwealth Bank Act* 1945. Assent was given to both of these Acts on the same day—3rd August 1945. The *Banking Act* contains general provisions relating to authority to carry on banking business, protection of depositors, special accounts, advances and investments, and various subjects which clearly fall within any ordinary definition of "banking." Section 4 defines "bank" to mean "a body corporate authorised under Part II. of this Act to carry on banking business in Australia." Section 5 provides that nothing in Part II. or V. or in ss. 48 to 56 of the Act shall apply with respect to State banking. Part II. (ss. 6 to 28) contains provisions relating to the carrying on of banking business and Part V. deals with interest rates. Section 48 has already been quoted.

Part II. of the Act provides in s. 6 that "Subject to this Act, a person other than a body corporate shall not, at any time after the expiration of six months from the commencement of this Part, carry on any banking business in Australia." Section 7 requires a body corporate to have an authority in writing granted by the Governor-General to carry on banking business as a condition of carrying on such business. Section 8 provides that "The Governor-General shall, within seven days after the commencement of this Part, grant to each body corporate specified in the First Schedule an authority to carry on banking business in Australia." The bodies specified in the First Schedule include, *inter alia*, the National Bank of Australasia Limited, with which the City Council has been doing its banking business, and other specified banks which operate under charter or under State *Companies* and *Bank Acts*. Section 8 also provides for the granting of licences, either unconditionally or subject to conditions specified by the Governor-General, to other bodies corporate to carry on the business of banking. Under s. 8 (5) it is provided that where an authority is granted under the section subject

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to conditions, the Governor-General may from time to time vary or revoke any of those conditions or impose additional conditions. The penalty for breach of a condition is £1000 for each day: s. 8 (6). The Act contains no statement of the conditions which the Governor-General may attach to the grant of an authority; but no question is raised by this case as to either the construction or the validity of this provision.

The *Commonwealth Bank Act* 1945 carries on the Commonwealth Bank as established under earlier Acts, which are repealed by the Act. Section 8 of the Act is as follows:—

"It shall be the duty of the Commonwealth Bank, within the limits of its powers, to pursue a monetary and banking policy directed to the greatest advantage of the people of Australia, and to exercise its powers under this Act and the *Banking Act* 1945 in such a manner as, in the opinion of the Bank, will best contribute to—

(*a*) the stability of the currency of Australia;

(*b*) the maintenance of full employment in Australia; and

(*c*) the economic prosperity and welfare of the people of Australia."

Section 9 of the Act is in the following terms:—

"(1) The Bank shall, from time to time, inform the Treasurer of its monetary and banking policy.

(2) In the event of any difference of opinion between the Bank and the Government as to whether the monetary and banking policy of the Bank is directed to the greatest advantage of the people of Australia, the Treasurer and the Bank shall endeavour to reach agreement.

(3) If the Treasurer and the Bank are unable to reach agreement, the Treasurer may inform the Bank that the Government accepts responsibility for the adoption by the Bank of a policy in accordance with the opinion of the Government and will take such action (if any) within its powers as the Government considers to be necessary by reason of the adoption of that policy.

(4) The Bank shall then give effect to that policy."

The Act contains provisions relating to central banking functions of the Commonwealth Bank, to the general banking business of the bank and to other departments of the bank.

Under s. 8 the opinion of the bank determines the manner in which the powers of the bank shall be used for the purpose of promoting the objects specified under the headings (*a*), (*b*) and (*c*), and s. 9 enables the Treasurer, in the event of difference of opinion, to control the monetary and banking policy of the bank. I can see no legal ground for objecting to the provision that the powers of the bank

are to be utilized for the purpose of attaining the general objectives mentioned, even though the Commonwealth Parliament has no specific power of legislation with respect to certain of those objectives. The Commonwealth Parliament has full power of legislating with respect to the currency of Australia under the Constitution, s. 51 (xii.). But the Commonwealth Parliament has no power to legislate with respect to " the maintenance of full employment in Australia " and " the economic prosperity and welfare of the people of Australia " as subjects in themselves. The Commonwealth Parliament is a Parliament which possesses only " enumerated or selected legislative powers "—a proposition " as to which this Court has never faltered " (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1)). As in the United States of America, the State Governments " are the ordinary governments of the country ; the federal government is its instrument only for particular purposes " (*Woodrow Wilson* in *Constitutional Government in the United States* (1908), pp. 183, 184, quoted by *Douglas* J. in *New York* v. *United States* (2)). The Commonwealth Parliament has no general power to make laws for the peace, order and good government of the people of Australia. In s. 51, which is the principal source of the legislative powers of the Commonwealth Parliament, power is conferred in the following words—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—(i.) Trade and commerce with other countries and among the States," and thirty-nine other specific subjects. Other sections confer powers to legislate with respect to other specific subjects. No power is conferred upon the Commonwealth Parliament to make laws with respect to the subjects of full employment in Australia or the economic prosperity and welfare of the people of Australia.

But the Commonwealth Parliament may exercise the powers which it does possess for the purpose of assisting in carrying out a policy which may affect matters which are not directly within its legislative powers. So this Court has held in *Osborne* v. *The Commonwealth* (3) ; *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (4) ; and see other cases cited in *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (5). There is no legal obstacle to the use of the Commonwealth Bank as a means of aiding Government policy with respect to employment and economic conditions.

(1) (1920) 28 C.L.R. 129, at p. 150.
(2) (1946) 326 U.S. 572, at p. 592 [90 Law. Ed. 326, at p. 339].
(3) (1911) 12 C.L.R. 321.
(4) (1938) 59 C.L.R. 170.
(5) (1942) 65 C.L.R. 373, at pp. 424, 425.

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Accordingly, in my opinion, no objection to s. 48 of the *Banking Act* can be founded merely upon the fact that legislative directions are given to the Commonwealth Bank by ss. 8 and 9 of the *Commonwealth Bank Act*. This conclusion, however, simply means that it is within the power of the Commonwealth Parliament to give directions to, or to provide for directions being given, the Commonwealth Bank as to the manner in which it is to exercise its functions. It leaves untouched the separate and distinct question as to the degree of control over the banking business of States and State authorities which can be exercised by the Commonwealth Parliament under the power to legislate with respect to banking.

In the first place, it is contended for the plaintiff that s. 48 is not legislation with respect to banking. The argument is that s. 48 of the *Banking Act* simply picks out States and State authorities for subjection to a Commonwealth banking monopoly without any reason which can be described as a reason grounded upon any considerations relating to banking. In other words, s. 48, it is said, is really a law with respect to States and State authorities, controlling them in respect of their banking business, and is not a law with respect to banking. Various analogies were suggested. It was put that if s. 48 is valid in its present form a provision would be equally valid which prohibited a bank from conducting any banking business with any person except with the consent in writing of the Treasurer. If it were sought to obtain a monopoly for the Commonwealth Bank or for any other bank favoured by the Treasurer in this manner the result would be the exclusion of particular persons or classes of persons from the utilization of banking facilities. Under such a provision all persons professing a particular religion or belonging to a particular political party or following a particular occupation could be prevented from using any banking facilities or could be compelled to deal with a particular bank selected by the Treasurer. Such legislation, it was contended, would not be legislation truly with respect to banking, but would be legislation with respect to the particular classes of persons arbitrarily selected by the Treasurer for disqualification or limitation in respect of banking business.

The defendants replied to this contention by referring to *Huddart Parker Ltd.* v. *The Commonwealth* (1) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (2). In these cases it was assumed by the Court that the power of the Commonwealth Parliament to make laws with respect to trade and commerce with other countries and among the States enabled the Parliament (by the *Transport Workers Act* 1928-1929) to require persons to obtain

(1) (1931) 44 C.L.R. 492. (2) (1931) 46 C.L.R. 73.

licences as a condition of engaging in certain operations in such trade and commerce. Section 48 of the *Banking Act* was, it was submitted, a similar provision requiring banks to obtain a licence from the Treasurer as a condition of engaging in banking business for States or State authorities. But there are at least two points of distinction between these cases and the present case. Under the *Transport Workers Act* every person had a right to obtain a renewal of a licence, and the reasoning upon which this decision was based shows, in my opinion, that every person had a right to obtain a licence (*R.* v. *Mahony*; *Ex parte Johnson* (1)), he could be deprived of his licence only upon specified grounds which were relevant to the work of transport workers, and there was an appeal to a court against deprivation of licence. Section 48 of the *Banking Act* leaves the grant or refusal of consent entirely to the discretion of the Treasurer. In the second place, s. 48 singles out for special treatment the banking business of States and State authorities. There was no feature of this character in the *Transport Workers' Acts*.

Under the section the Treasurer can give consent in the case of one State and refuse it in the case of another State. The consent (sub-s. (2)) may apply to all the banking business for a State or State authority conducted by a particular bank or at a particular office of a bank or to the business of any particular State or authority conducted by any particular bank or at a particular office of a bank. It would appear, therefore (though this matter was not fully argued), that the Treasurer could not limit his consent to some particular kind of banking business—the consent must be to all or none of the banking business for a State conducted by a particular bank or by a particular bank at a particular place. Thus, it is argued, the character of the banking business done cannot be a ground for giving or withholding a licence, so that the section simply gives the Treasurer an arbitrary discretion, not related to any consideration affecting banking, to prohibit banking operations by a State.

The plaintiff's argument directed to s. 48 as it now actually stands is based upon the proposition that there can be no reason of a banking character for making a special provision for States or State authorities. It is contended for the defendants, on the other hand, that the establishment of banks, and in particular of central banks, for the purpose of conducting the banking business of governments and managing public finance is a well-recognized department of banking. This contention, expressed in general terms, appears to me to be well founded.

(1) (1931) 46 C.L.R. 131.

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There are many instances of special relations between governments and banks discharging central banking functions and to a large extent managing governmental financial operations. The Bank of England has been a financial agent of the Government of Great Britain for many years. So also in the United States of America banks have been established as instrumentalities of governments—per *Griffith* C.J. in *Heiner* v. *Scott* (1), referring to *M'Culloch* v. *Maryland* (2) and *Osborn* v. *Bank of United States* (3). But while the contention of the defendants accurately states the position in the case of a unitary constitution where it is not necessary to consider the relation in which States stand to a Commonwealth or Provinces to a Dominion or other federal organism, it cannot be accepted and applied without limitation in the case of a constitution where the States or Provinces are not subordinate to the federal power except in respect of particular matters. It is one thing for a Government to establish a bank for the purpose of doing the banking business of that Government. It is quite a different thing for the Parliament and Government of a Commonwealth to establish a bank and to require the States to do all their business with that bank. The giving of a monopoly of governmental banking business to a particular bank selected by a Government is a not abnormal feature of legislation with respect to banking, but this statement does not cover the case of one Government seeking to select a bank to do all the banking business of another Government, both governments being subject to a federal constitution. Thus, in my opinion, though the argument that s. 48 is not legislation with respect to banking should not be accepted, the rejection of this argument still leaves open for consideration the question of the validity of such a provision under a constitution establishing not only a federal Government with specified and limited powers, but also State Governments which, in respect of such powers as they possess under the Constitution, are not subordinate to the federal Parliament or Government. State constitutional powers are, subject to the Commonwealth Constitution, expressly preserved by the Commonwealth Constitution—ss. 106, 107.

The second argument for the plaintiff is that if s. 48 is a law with respect to banking it is a law with respect to State banking, and that the express terms of s. 51 (xiii.) of the Constitution prevent the Commonwealth Parliament from making any law with respect to State banking. The contention that s. 48 is a law with respect to State banking challenges an assumption upon which s. 48 is based.

(1) (1914) 19 C.L.R. 381, at p. 392.
(2) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(3) (1824) 22 U.S. 738 [6 Law. Ed. 204].

Section 5 of the Act expressly provides that s. 48 shall not apply with respect to State banking. Section 48 expressly relates to the conduct of banking business by a bank (i.e. a bank authorized under Part II.—see s. 4) for a State. Thus s. 48 assumes that the conduct of banking business by a bank (not being a State bank—s. 5) is not " State banking." If this assumption is wrong, s. 48 is invalid as dealing with a subject expressly removed by s. 51 (xiii.) of the Constitution from Commonwealth legislative power.

A banker conducts a business of banking with customers. The customer of a banker does his banking business with the banker. That which the banker does as a banker is the business of banking, and that which the customer does as a customer of the banker is also the business of banking. If, under the power to legislate with respect to " banking," there is power to legislate with respect to the conduct of customers of bankers in their capacity as such customers—and this is a proposition which can hardly be disputed—then, it is argued for the plaintiff, when it becomes necessary to interpret the words " State banking " the same meaning must be given to " banking " in that phrase. That is to say, the word " banking " in the exception of " State banking " must be construed as including the business of banking if the State establishes and conducts a bank, and also the business done by the State as a customer of any bank. It is contended that it is only upon this view that the same meaning can be given to the word " banking " where it is twice used in the phrase " banking other than State banking."

This argument is plausible, but in my opinion it should not be accepted. It is true that the power to legislate with respect to banking includes a power to legislate with respect to customers of a bank in their capacity as customers of the bank. So also I interpret the exception of " State banking " as excluding any power to make laws not only with respect to banks conducted by States, but also with respect to customers, in their capacity as customers, of banks so conducted. Upon this construction the same meaning is given to the word " banking " in each case where it appears.

" State banking " cannot, in my opinion, be construed as meaning banking operations transacted within a State, i.e. intra-State banking. Such a construction is, it is true, suggested by the exclusion from federal legislative power of " State banking " together with the express inclusion within that power of " State banking extending beyond the limits of the State concerned." But, if placitum (xiii.) were so interpreted the federal power could be exercised only under the provision relating to " State banking extending " &c., because all other banking in Australia would be banking within a State and,

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upon the construction suggested, would be " State banking " and therefore excluded from federal legislative power. The result would be that the power to make laws with respect to " banking " would have no possible field of operation. The phrase " State banking extending beyond the limits of the State concerned " shows that the words " State banking " are not used to mean banking transactions conducted entirely within a State, because if that were the case the phrase quoted would be self-contradictory.

The words to be construed in the exception " other than State banking " constitute a compound phrase—" State banking." The question is—What is the natural signification of those words ? In my opinion if the question were asked with respect to a particular country, " Is there any State banking in the country ?" the question would be understood to be an inquiry whether the State conducted banks in that country. It would not be understood to be an inquiry whether some State had dealings as a customer with any banks in that country. " State banking " in my opinion refers to banks established and conducted by a State or by an authority established under State law and representing a State. The exception contained in the words " other than State banking " prevents the Commonwealth Parliament from passing any laws with respect to the establishment, management and conduct of such banks by the State, or with respect to the conduct of customers of such banks in their capacity as such customers. But the exception does not prevent the Commonwealth Parliament from making laws with respect to the conduct of customers (including States) of banks other than State banks. Accordingly, in my opinion, it should not be held that s. 48 of the *Banking Act* is invalid as being legislation with respect to State banking.

The third argument of the plaintiff is that s. 48 introduces a degree of control of State banking activities which is forbidden by the Federal Constitution. The proposition upon which the plaintiff relies is that the Commonwealth Parliament cannot, even under a legislative power expressly conferred upon it, make a " discriminatory " as distinct from a general, law, which is aimed at or directed against an essential governmental power or function of a State.

It may be difficult to determine in some cases whether a function in fact undertaken by a Government is a governmental function which, under a federal constitution, cannot be controlled by another Government established under the constitution. But there can be no doubt that not only the raising of money by taxation, but also provision for the custody, management and disposition of public revenue moneys are activities which are essential to the very existence

of a Government. It is equally essential that a Government should have the power of borrowing money and of providing for the custody and expenditure of loan moneys. In *M'Culloch* v. *Maryland* (1), it was held that a bank was " a convenient, a useful, and essential instrument in the prosecution of " the " fiscal operations " of the Government of the United States. The necessity of banking facilities to the Government of a country was emphasized in *Weston* v. *City Council of Charleston* (2), where *Marshall* C.J. referred to the Bank of the United States as " an instrument essential to the fiscal operations of the Government." It would be impossible in practice for a State Government to exist without making provision for the custody and expenditure of public moneys, and it could not do this in modern conditions without using a bank.

The various State *Audit Acts* contain provisions with respect to the custody and disposition of public moneys which cannot operate according to their terms if s. 48 is valid and is put into operation. I mention the following by way of illustration. The *Audit Act* 1928 (Vict.), s. 22, requires receivers of public revenue to pay moneys into such bank at such place and in such manner as the Governor (i.e. the Governor of the State) in Council appoints. For failure to comply with this provision there is a penalty not exceeding £500. Section 26 is a similar provision. The *Audit Act* 1921-1936 (S.A.), s. 18, is as follows :—

" The Treasurer may, from time to time, agree with any bank upon such terms and conditions as he may think fit for the receipt, custody, payment, and transmission of public moneys within or without the State, and for advances to be made and for the charges in respect of the same, and for the interest payable by or to the bank upon balances or advances respectively, and generally for the conduct of the banking business of the State."

Section 19 provides that :—

" (1) The Public Account shall be kept in such bank and under such subdivisions (if any) as the Treasurer may, in writing, direct.

(2) All moneys paid into any bank to the Public Account shall be deemed to be public moneys and the property of His Majesty, and to be money lent by His Majesty to the bank."

The *Audit Act* 1904 (W.A.), s. 21, is in the same terms as s. 18 of the South Australian Act.

If s. 48 of the *Banking Act* is valid, these provisions will become ineffective—it will be the Commonwealth Treasurer, and not the State Treasurer who will determine in what bank the State moneys

(1) (1819) 17 U.S., at p. 422 [4 Law. Ed., at p. 605].

(2) (1829) 27 U.S. 449, at p. 469 [7 Law. Ed. 481, at p. 488].

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will be kept and how they may be withdrawn and for what purposes advances may be made. These matters are plainly subjects of great importance to the States.

It is conceded for the plaintiff that the Commonwealth Parliament may pass general legislation with respect to banking, and that it may specify conditions (relevant to the subject of banking) which must be complied with by banks and by customers of banks. But s. 48 is specifically directed to and limited to States as customers of banks. It has the effect of submitting their banking operations to the control of the Commonwealth Bank, which is in turn subject to the control of the Commonwealth Treasurer (*Commonwealth Bank Act*, ss. 8 and 9). If s. 48 is valid, a State and a State authority can, in the absence of any available State bank, be compelled to do all its banking business with the Commonwealth Bank. This is stated by the Treasurer to be the object (as it is plainly the consequence) of the notification proposed to be made under s. 48. As the Commonwealth Bank is under no legal obligation to accept the business of any State—either upon any particular terms or at all—the result is that the operations of a State in paying money into a bank, in drawing out money, and in obtaining advances from a bank, will be subject to Commonwealth control. Such operations are included within banking business as generally conducted: See *Commissioners of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (1). Thus the Commonwealth Bank, acting under direction of the Commonwealth Treasurer, could, so far as legal obligation goes, decline to accept moneys or to allow cheques to be drawn for particular purposes or at all, and could refuse to make advances for particular purposes—even though the Parliament of the State had appropriated moneys for those purposes. It is contended that legislation which is specifically directed towards—or, as it is put, against—a State and State authorities in relation to the custody, control and management of public revenue and loan moneys is legislation which is forbidden by the Constitution as dealing, and especially as dealing in a discriminatory manner, with an essential State governmental power, capacity, and function.

In *D'Emden* v. *Pedder* (2), it was decided that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." This rule was, in that case, applied in favour of the Commonwealth. In *Federated*

(1) (1914) 19 C.L.R. 457.

(2) (1904) 1 C.L.R. 91, at p. 111.

Amalgamated Government Railway and Tramway Service Association v. *N.S.W. Railway Traffic Employees Association* (1), and other cases, the rule was extended so as to apply in favour of a State as a reciprocal limitation upon Commonwealth legislative power. In the *Engineers' Case* (2), this extension of the rule was repudiated. It was held that *D'Emden* v. *Pedder* (3) really stated in other words the effect of s. 109 of the Constitution, which gives supremacy over State legislation to laws made under powers conferred upon the Commonwealth Parliament by the Constitution. It was held, therefore, that it was a fundamental mistake to treat what had been called the "reserved powers" of the States as a basis for implying any limitation upon Commonwealth power. The "reserved powers" of the States can be ascertained only after the extent of Commonwealth power has been determined. A grant of power cannot be construed by first purporting to describe the residue left by the grant. I venture to refer to what I have said on this matter in the *Uniform Taxation Case* (4). In the *Engineers' Case* (2) it was decided that "laws validly made by authority of the Constitution bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States—in other words, bind both Crown and subjects" (5). Thus the validity of a Commonwealth law is to be determined by reference to the terms of the Constitution, without applying any presumption that there are certain powers reserved to the States which must not be impaired or interfered with by federal laws.

But this principle does not mean that the States are in the position of subjects of the Commonwealth. The Constitution is based upon and provides for the continued co-existence of Commonwealth and States as separate Governments, each independent of the other within its own sphere. The *Engineers' Case* (2) recognizes, in the case of State legislation, a difference between "provisions which apply generally to the whole community without discrimination" and "an act of the State legislature discriminating against Commonwealth officers." The former may be valid and the latter might be invalid (6). In *Pirrie* v. *McFarlane* (7), there are several references to the same distinction—see the report (8). In *West* v. *Commissioner of Taxation (N.S.W.)* (9), *Dixon* J. made the observation that the *Engineers' Case* (2) "does not appear to deal with or affect the question whether the Commonwealth Parliament is authorized to

(1) (1906) 4 C.L.R. 488.
(2) (1920) 28 C.L.R. 129.
(3) (1904) 1 C.L.R. 91, at p. 111.
(4) (1942) 65 C.L.R., at p. 422.
(5) (1920) 28 C.L.R., at p. 153.
(6) (1920) 28 C.L.R., at pp. 156, 157.
(7) (1925) 36 C.L.R. 170.
(8) (1925) 36 C.L.R., at pp. 184, 216, 217, 229.
(9) (1937) 56 C.L.R. 657, at p. 682.

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enact legislation discriminating against the States or their agencies." *Dixon* J. repeated this comment in *Essendon Corporation* v. *Criterion Theatres Ltd.* (1). In *West's Case* (2) *Evatt* J. referred to the distinction between general laws and laws " discriminating against " Commonwealth or State officials and said :—" A different angle of approach to the question of discriminatory legislation is this, that it must at least be implied in the Constitution, as an instrument of Federal Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward the destruction of the normal activities of the Commonwealth or States." See also the *Uniform Taxation Case* (3), as to the distinction between general legislation and legislation limited to a particular case. This distinction has been regarded as of significance by the Privy Council in determining questions of the validity of laws : See e.g. *Great West Saddlery Co. Ltd.* v. *The King* (4).

In the United States of America, as in Australia, the doctrine of immunity of State instrumentalities from federal legislative control has had a chequered career. In *M'Culloch* v. *Maryland* (5) it was decided that a State could not impose a tax upon a bank incorporated by Congress for fiscal purposes of the Government because " the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." In *Weston* v. *Charleston* (6) the Supreme Court declared invalid a State Act taxing stock of the United States. The principle stated in these and similar cases was not limited to the power of taxation, but applied to any State attempt to control federal instrumentalities.

In *Veazie Bank* v. *Fenno* (7), it was held that Congress could impose a tax upon the circulation of notes issued by a bank chartered under State law of such amount as to prevent the use of such notes. In this case the Court, however, included a saving clause in its reasons for judgment in the following terms :—" It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate

(1) *Ante*, p. 1, at p. 23.
(2) (1937) 56 C.L.R., at p. 687.
(3) (1942) 65 C.L.R., at p. 431.
(4) (1921) 2 A.C. 91, at p. 119.
(5) (1819) 17 U.S., at p. 436 [4 Law. Ed., at p. 609].
(6) (1829) 27 U.S. 449 [7 Law. Ed. 481].
(7) (1869) 75 U.S. 533 [19 Law. Ed. 482].

purposes of State Government, are not proper subjects of the taxing power of Congress " (1).

In *The Collector* v. *Day* (2), the Court applied the general principle of *M'Culloch* v. *Maryland* (3) in favour of State instrumentalities and held that the salary of a State judge could not be taxed under Acts of Congress which were general taxation laws. The Court said— " in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation ? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation ; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government " (4). The court relied upon what I have called the saving clause in *Veazie Bank* v. *Fenno* (5). Thus the doctrine of reciprocal immunity of Federal and State instrumentalities was fully established.

Many difficulties arose in the application of this doctrine, and in *Graves* v. *New York* (6), *The Collector* v. *Day* (2) was overruled. It was held that State income tax could validly be imposed upon Federal officers, the non-discriminatory nature of the law being made the basis of the decision. This rule was applied in other cases, such as *James* v. *Dravo Contracting Co.* (7) (State taxation of the gross receipts of a contractor with the federal Government) ; *Helvering* v. *Gerhardt* (8) (federal taxation of salaries of officers of a State Port Authority) ; *Allen* v. *Regents of University System of Georgia* (9) (federal taxation of a corporation created as a State instrumentality

(1) (1869) 75 U.S., at p. 547 [19 Law. Ed., at p. 487].
(2) (1870) 78 U.S. 113 [20 Law. Ed. 122].
(3) (1819) 17 U.S. 316 [4 Law. Ed. 579].
(4) (1870) 78 U.S., at p. 127 [20 Law. Ed., at pp. 126, 127].
(5) (1869) 75 U.S. 533 [19 Law. Ed. 482].
(6) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(7) (1937) 302 U.S. 134 [82 Law. Ed. 155].
(8) (1938) 304 U.S. 405 [82 Law. Ed. 1427].
(9) (1938) 304 U.S. 439 [82 Law. Ed. 1448].

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to manage, *inter alia*, athletic exhibitions); *O'Malley* v. *Woodrough* (1) (State taxation of the salary of a federal judge). In all these cases the law was upheld expressly on the ground that it was non-discriminatory.

The case of *New York* v. *United States* (2) corresponds to the *Engineers' Case* (3) in Australia. It represents a further endeavour to enunciate a principle which will allow Federal and State Governments to exercise powers, particularly of taxation, over the same persons, without conflict. The judgments, proceeding as they do upon differing grounds, illustrate the difficulties of the problem. It is recognized that a federal system fails unless the federal and State Governments can each carry out their functions as contemplated by the Constitution. The subordination of either to the other is inconsistent with a federal system. But, as in the *Engineers' Case* (3), it was held that some federal legislation, even taxation legislation, is applicable to the States. It was held that the State of New York, which owned and operated certain mineral water springs, was not immune from a tax imposed upon mineral waters by an Act of Congress. (Similarly in Australia it has been held that the States are bound to pay federal customs and excise duties (*R.* v. *Sutton* (*Wire Netting Case*) (4), and *Attorney-General* (*N.S.W.*) v. *Collector of Customs* (*Steel Rails Case*) (5)).

In *New York* v. *United States* (2) all the justices conceded that the powers of the Federal Government cannot be used to destroy State Governments and vice versa, but the majority was of opinion that the extension of governmental activities into many trading and similar activities had made it impracticable to uphold a general rule of immunity in the broad terms of *M'Culloch* v. *Maryland* (6) and *The Collector* v. *Day* (7). It was admitted, however, by all the justices that there are some activities which are necessarily governmental in character (cf. *Uniform Taxation Case* (8)), and that federal and State legislatures are limited in their powers of legislation with respect to agencies of other governments.

In the judgment of *Frankfurter* and *Rutledge* JJ. it is stated that the fact that " ours is a federal constitutional system . . . carries with it implications regarding the taxing power as in other aspects of government . . . Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons

(1) (1939) 307 U.S. 277 [83 Law. Ed. 1289].
(2) (1946) 326 U.S. 572 [90 Law. Ed. 326].
(3) (1920) 28 C.L.R. 129.
(4) (1908) 5 C.L.R. 789.
(5) (1908) 5 C.L.R. 818.
(6) (1819) 17 U.S. 316 [4 Law. Ed. 519].
(7) (1870) 78 U.S. 113 [20 Law. Ed. 122].
(8) (1942) 65 C.L.R. 373, at p. 423.

would do violence to the presuppositions derived from the fact that we are a Nation composed of States" (1). (This statement may be compared with those which I have quoted from Australian cases distinguishing between general legislation which includes States and State agencies and legislation described as discriminating against States and their agencies.) The limitation upon federal legislative power in relation to the States is expressed by these learned justices in the following words :—" There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse ; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. Cf. *Springfield Gas and Electric Co.* v. *City of Springfield* (2) ; *University of Illinois* v. *United States* (3) ; *Puget Sound Power and Light Co.* v. *City of Seattle* (4). If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State : 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy'" (5). The federal law was upheld because it was not specifically directed against the States, but levied a tax " exacted equally from private persons upon the same subject matter " (6).

Rutledge J., in a separate opinion, based his decision upon the absence of discrimination against a State. He explained what was meant by discrimination in this connection by saying that he took the limitation against discrimination " to mean that state functions may not be singled out for taxation when others performing them are not taxed or for special burdens when they are," and he added, " Perhaps there are other limitations also " (7).

(1) (1946) 326 U.S., at p. 575 [90 Law. Ed., at p. 330].
(2) (1921) 257 U.S. 66 [66 Law. Ed. 131].
(3) (1933) 289 U.S. 48, at p. 57 [77 Law. Ed. 1025, at p. 1028].
(4) (1934) 291 U.S. 619 [78 Law. Ed. 1025].
(5) (1946) 326 U.S., at p. 582 [90 Law. Ed., at pp. 333, 334].
(6) (1946) 326 U.S., at p. 584 [90 Law. Ed., at p. 335].
(7) (1946) 326 U.S., at p. 585 [90 Law. Ed., at p. 335].

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Stone C.J., *Reed*, *Murphy* and *Burton* JJ., though agreeing in regarding "as untenable" the distinction which had been drawn in earlier cases between "governmental" and "proprietary" interests of States, said: "Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government" (1). They proceeded to observe that even a federal tax which was not discriminatory as to the subject matter "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government" (2). (It may be observed, with respect, that this statement of principle renders it necessary to distinguish between the "sovereign functions of Government" performed by a State and other functions assumed and performed by it.) It is said that a tax "even though non-discriminatory, may be regarded as infringing its sovereignty" (2) because a sovereign Government was the taxpayer. The test is stated to be whether the tax, even if non-discriminatory, "unduly interferes with the performance of the State's functions of government" (3). A law which specifically and directly interfered with a State's functions of government would plainly be invalid under this principle—whether it was or was not a taxation law.

I quote these American decisions, not as authorities upon the construction of the Australian Constitution, but as illustrating in an instructive manner the method by which an endeavour has been made to solve a problem which necessarily arises under a federal constitution. The relevant result which emerges is the same as that which is suggested by the more recent cases in this Court to which reference has been made—namely that federal laws expressed in general terms may apply to the States (as was shown in the *Engineers' Case* (4)) but that federal laws which "discriminate" against the States are not laws authorized by the Constitution. Laws "discriminate" against the States if they single out the States for taxation or some other form of control and they will also be invalid if they "unduly interfere" with the performance of what are clearly State functions of government.

I have some difficulty in understanding how "discrimination" in a precise sense can be shown in a law applying only to one person or class of persons in respect of a particular subject matter. Discrimination appears to me to involve differences in the treatment of two or more persons or subjects. Legislation with respect only to one

(1) (1946) 326 U.S., at p. 586 [90 Law. Ed., at p. 336].
(2) (1946) 326 U.S., at p. 587 [90 Law. Ed., at p. 336].
(3) (1946) 326 U.S., at p. 588 [90 Law. Ed., at p. 337].
(4) (1920) 28 C.L.R. 129.

or more persons or with respect only to one or more subjects is not, I suggest with respect, properly described as discriminating against other persons or other subjects simply because it leaves them alone. I refer to what I have said as to the nature of discrimination (but in reference to administrative decisions) in *Riverina Transport Pty. Ltd.* v. *Victoria* (1). In *New York* v. *United States* (2) and the other cases to which I have referred in which it has been held that a law may be invalid on the ground of " discrimination," the word " discrimination " is, I think, really used in the sense explained by *Douglas* J. in *New York* v. *United States* (2)—that is, singling out another government and specifically legislating about it.

But why should legislation " discriminating " in this—or any other sense—against States or Commonwealth (as the case may be) be held to be invalid ? It is true that taxation laws made by the Commonwealth Parliament must not discriminate between States or parts of States—Constitution, s. 51 (ii.). But this specific provision against discrimination in the case of this class of laws emphasises the absence from the Constitution of any provision prohibiting Federal legislation " discriminating " against the States or prohibiting State legislation " discriminating " against the Commonwealth.

In my opinion the reason why such legislation is invalid is that what is called " discrimination " shows that the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State—or, in the case of a State law specifically dealing with and seeking to control Commonwealth functions, that the State Parliament is really endeavouring to make laws with respect to the Commonwealth or Commonwealth functions as such. The Commonwealth Parliament has no power to make laws with respect to State governmental functions as such, and the State Parliaments have no power to make laws with respect to Commonwealth governmental functions as such. It is upon this ground, in my opinion, that what is called " discriminatory " legislation may properly be held to be invalid. I refer to what I said upon this subject in *West* v. *Commissioner of Taxation* (3).

Similarly, federal legislation which, though referring to a subject of federal power, is really legislation about what is clearly a State governmental function, may be said to " interfere unduly " with that function and therefore to be invalid. " Undue " interference is a rather vague conception, and an attempt to apply it as a standard

(1) (1937) 57 C.L.R. 327, at pp. 343, 344.
(2) (1946) 326 U.S. 572 [90 Law. Ed. 326].
(3) (1937) 56 C.L.R. 657, at pp. 668, 669.

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for determining the validity of legislation would invite and would certainly produce differences of opinion which would often be due to other than objective considerations. In my opinion the invalidity of a federal law which seeks to control a State governmental function is brought about by the fact that it is in substance a law with respect to a subject as to which the Commonwealth Parliament has no power to make laws. Though there will sometimes be difficulties in applying such a criterion, this is a more satisfactory ground of decision than an opinion that a particular federal "interference" with a State function reaches a degree which is "undue."

The application of these principles in the present case brings about the conclusion that s. 48 of the *Banking Act* is invalid. The section requires the consent of the Treasurer to the conduct of banking business by a bank only in the case of States and State authorities, including local governing authorities. It singles out States and State agencies and creates a rule for them and for no others. It is in substance legislation about States and State authorities. It can fairly be described as being aimed at or directed against States—and it none the less falls within this disqualifying category because it is also aimed at and directed against what are called "private banks." On this ground, in my opinion, s. 48 is invalid.

No reference was made in argument to a provision of the Financial Agreement (see *Financial Agreement Act* 1928) which, in my opinion, is relevant to the question raised by the demurrer. Section 105A (5) of the Constitution provides in relation to such agreements as the Financial Agreement:—"Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State." Thus no legislation, whether federal or State, can be valid if it is inconsistent with the Financial Agreement. The provisions in the Agreement may be varied by another agreement duly made in accordance with s. 105A, but not by either federal or State statutes independently of such other agreement.

In the Financial Agreement (see schedule to the Act), Part I. (5), last paragraph, the following provision appears:—"Notwithstanding anything contained in this Agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount, and other charges, borrow money for temporary purposes by way of overdraft, or fixed, special or other

deposit, and the provisions of this Agreement other than this paragraph shall not apply to such moneys."

This provision confers upon a State a right to borrow money by way of overdraft subject to certain conditions. These conditions are that the borrowing must be for temporary purposes, and that any decisions of the Loan Council as to maximum limits for interest, brokerage, discount and other charges must be observed.

Lending money on overdraft by a bank and borrowing money by a customer on overdraft from a bank are "banking business"—*Commissioners of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (1). Such operations are therefore included within the business for which the consent of the Federal Treasurer is required when s. 48 of the *Banking Act* is applied. The right to borrow money on overdraft includes (if, indeed, it does not actually mean) a right to borrow from a bank. The word "overdraft" is the word most commonly used to describe advances by a bank.

An ordinary borrowing by overdraft involves the right to draw cheques up to an agreed limit, reduction of indebtedness from time to time by the payment of moneys into the bank, and the charging of interest by the bank. To borrow money in this way (subject only to the conditions specified in the Agreement) is a right conferred upon a State by the Financial Agreement and no law, federal or State, can limit or restrict it. Federal law cannot validly provide that this right shall not be exercised except with the consent of the Federal Treasurer. Section 48 attempts to subject the State in the exercise of this right not even to the control of the Loan Council (which consists of both Commonwealth and State representatives), but to the control of the Federal Treasurer, who is one of the members of the Loan Council. Such a provision must, in my opinion, in view of the terms of s. 105A (5) of the Constitution, be held to be invalid in so far as it applies to borrowing on overdraft by any State.

My conclusion that s. 48 is invalid is not affected by the facts that s. 48 does not apply and, by reason of the terms of the Constitution, s. 51 (xiii.), could not have been made applicable to State banking, and that the Parliament of Victoria could, if it thought proper, establish a State bank with general banking functions. Such a bank would, it is true, be free from Federal control under s. 48 or under any law passed by the Commonwealth Parliament under the power to make laws with respect to banking. But it would still be the case that s. 48 is a provision aimed at the States in respect of what is undeniably an essential governmental function, that it is "discriminatory" in the sense above explained, and that it makes the exercise of a right

(1) (1914) 19 C.L.R. 457.

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assured to the States by the Financial Agreement dependent upon Federal acquiescence or permission. The exclusion of State banking from s. 48 thus does not provide a reply to the objections to the validity of the section upon which my conclusion is based.

For the reasons stated, I am of opinion that s. 48 is wholly invalid. The demurrer should be overruled and a declaration should be made that s. 48 of the *Banking Act* 1945 is void. The plaintiff claimed a declaration that the whole of the *Banking Act* is invalid, but it is not necessary, for the purposes of this case, to express an opinion as to the validity of any provision other than s. 48.

RICH J. The question raised by the demurrer now before us is as to the constitutional validity of s. 48 of the *Banking Act* 1945, which, in effect, prohibits a bank from conducting any banking business for a State or for any authority of a State, including a local governing authority, except at the will of the Commonwealth Treasurer. It is sought, on behalf of the Commonwealth, to support the provision by reference to s. 51, pl. (xiii.), of the Commonwealth Constitution, which grants to the Parliament of the Commonwealth power to make laws with respect to banking, other than State banking: also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money.

I may say at once that I agree with the submissions that the section relates to banking, and that it does not relate to State banking in the sense in which that phrase is used in the placitum, namely the carrying on by the State of the business of banking. While the word "banking" is sometimes used in a colloquial and crude sense to mean the payment of money to the credit of a customer's account at a bank, the word in its normal and ordinary signification denotes the business of banking. Some assistance in defining "banking" can be obtained from the *Bills of Exchange Act* 1909-1936. In this Act the word "'banker' includes a body of persons, whether incorporated or not, who carry on the business of banking," and though banking is not defined in this Act it seems reasonable to believe that one legislative interpretation of the word would be the business carried on by a banker. In the case of *Commissioners of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (1), *Isaacs* J., as he then was, said: "The fundamental meaning of the term" (banking) "is not, and never has been, different in Australia from that obtaining in England. Various writers attempt various definitions, more or less discordant, and many of them referring to functions that are now

(1) (1914) 19 C.L.R. 457, at pp. 470, 471.

very common and convenient, and even prominent, as if they were indispensable attributes. The essential characteristics of the business of banking are, however, all that are necessary to bring the appellants within the scope of the enactments" (s. 83 of the Victorian *Instruments Act* 1890 and s. 88 of the *Bills of Exchange Act* 1909) "and these may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society." And see *Thomson's Dictionary of Banking*, 9th ed. (1939), p. 55. In my opinion s. 51 (xiii.) must be construed in the light of what I consider to be the ordinary and normal meaning of the word "banking" and if this be so, the words "Banking other than State banking" should be construed as meaning the business of banking other than the business of banking carried on by a State. This view is, I think, confirmed by the remaining words of pl. (xiii.) "also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money." It is difficult to believe that the words "also State banking extending beyond the limits of the State concerned" were intended to mean the use by the State as a customer of banking facilities in more than one State and the other words "the incorporation of banks and the issue of paper money" clearly support the view I have expressed. I may add that in the *Banking Act* itself the Commonwealth Parliament appears to have regarded State banking as the business of banking carried on by a State. This appears to be the obvious meaning of "State banking" in s. 5 of the Act. But whatever may be the meaning of "banking" the proper interpretation of the words "other than State banking" is, that the Commonwealth Parliament, while empowered to make laws with respect to banking, is not empowered to make laws with respect to State banking, unless it extends beyond the limits of the State concerned.

In *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association (No. 2)* (1) *Higgins* J. said: "Where the Constitution means that the powers conferred on Parliament shall not be applied to the State operations, it expressly says so, as in pl. xiii. (banking); pl. xiv. (insurance)." See also *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2).

The question then is, whether the provision being prima facie within power, it is obnoxious to the Constitution. The first point to be kept in mind is that the Constitution expressly provides for a federal form of government involving the existence of both Common-

(1) (1920) 28 C.L.R. 436, at p. 451. (2) (1920) 28 C.L.R. 129, at p. 158.

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wealth and States, the Commonwealth having conferred upon it only certain limited and defined legislative powers, and the States, within the limits of their own Constitutions, retaining exclusive powers in the field which remains after all Commonwealth powers have been exercised to the full extent of their widest scope. It is unnecessary to trace in detail the authorities by which the relationship of Commonwealth and State powers have been defined. The view once prevailed that any legislative or executive act of the Commonwealth which would, if valid, interfere with the free exercise by a State or its instrumentalities of their legislative or executive powers was *pro tanto* invalid. At a very early stage, however, there were decisions inconsistent with this view, and it was finally exploded by the *Engineers' Case* (1). There is no general implication in the framework of the Commonwealth Constitution that the Commonwealth is restricted from exercising its defined constitutional powers to their fullest extent by a supposed reservation to the States of an undefined field of reserved powers beyond the scope of Commonwealth interference. But this is always subject to the provisions of the Commonwealth Constitution itself. That Constitution expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because inconsistent with the express provisions of the Constitution, and it is to be noted that all the powers conferred by s. 51 are conferred "subject to this Constitution." Such action on the part of the Commonwealth may be invalid in two classes of case, one, where the Commonwealth singles out the States or agencies to which they have delegated some of the normal and essential functions of government, and imposes on them restrictions which prevent them from performing those functions or impede them in doing so; another, where, although the States or their essential agencies are not singled out, they are subjected to some provision of general application, which, in its application to them, would so prevent or impede them. Action of the former type would be invalid because there is nothing in the Commonwealth Constitution to authorize such action by the Commonwealth. A general income tax Act which purported to include within its scope the general revenues of the States derived from State taxation would be an instance of the latter.

I come now to s. 48 of the *Banking Act* 1945. Sub-section (1) of this section provides that "except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State

(1) (1920) 28 C.L.R. 129.

or for any authority of a State, including a local governing authority". Though this sub-section is expressed with some skilfulness, it necessarily implies that no State or authority of a State including a local governing authority can become the customer of a bank except with the consent in writing of the Treasurer. It has been laid down frequently by the Judicial Committee that in considering the constitutional validity of legislation it is necessary to look at the pith and substance of the legislation. For a recent statement of this principle see the remarks of Lord *Porter* in *Attorney-General for Canada* v. *Attorney-General for Quebec* (1). Moreover I think it is not competent for the Commonwealth or a State under the guise or the pretence or in the form of an exercise of its own power to carry out an object which is beyond its powers. See *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). In my opinion, the pith and substance of s. 48, however ingeniously expressed, is that a State or an authority of a State, including a local governing authority, must have the consent of the Treasurer in order to become the customer of a bank. Even assuming that "State banking" is not restricted to the business of banking conducted by a State or any authority of a State and that it includes banking by a State as a customer of banks, I think while power in a State and in its essential agencies to carry on the business of banking cannot be impaired, the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power also cannot be impaired. Accordingly, whatever meaning may be given to "State banking," s. 48 must be considered as wholly invalid.

It is interesting, although by no means conclusive, and in a sense perhaps hardly relevant, that in the federation of the United States of America there has been a somewhat similar development in constitutional law. The case of *The Collector* v. *Day* (3), having been overruled by *Graves* v. *New York* (4), the operation of discriminatory and non-discriminatory legislation affecting States has been examined in *New York* v. *United States* (5). It had already been dealt with to some extent by this Court in *West* v. *Commissioner of Taxation (N.S.W.)* (6), and *Tasmanian Steamers Pty. Ltd.* v. *Lang* (7).

In my opinion the demurrer affords no answer in law to the plaintiff's claim and should be overruled.

(1) (1947) A.C. 33, at p. 43.
(2) (1939) A.C. 117, at p. 130.
(3) (1870) 78 U.S. 113 [20 Law. Ed. 122].
(4) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(5) (1946) 326 U.S. 572 [90 Law. Ed. 326].
(6) (1937) 56 C.L.R. 657, at pp. 674, 681-683, 687-688.
(7) (1938) 60 C.L.R. 111, at pp. 125-126

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STARKE J. Demurrer on the part of the defendants to the statement of claim of the plaintiff claiming a declaration that the *Banking Act* 1945 or alternatively s. 48 thereof is beyond the powers of the Parliament of the Commonwealth and void, and also a declaration that s. 48 is of no effect by reason of the inclusion in the Act of a law imposing taxation and ancillary relief.

The claim for a declaration that s. 48 was of no effect by reason of the inclusion in the Act of a law imposing taxation was abandoned during the argument and in the end the attack upon the Act was confined to the provisions of s. 48, which provides :—

"(1) Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority. Penalty : One thousand pounds.

"(2) Any consent of the Treasurer under this section may apply to all such business conducted by any particular bank or at a particular office of a bank, or to the business of any particular State or authority conducted by any particular bank or at a particular office of a bank.

"(3) Until a date fixed by the Treasurer by notice published in the *Gazette*, this section shall apply only in relation to banking business conducted for a State or for an authority of a State, including a local governing authority, specified by the Treasurer by notice in writing, and, if an office of a bank is specified in the notice, at the office so specified."

The Treasurer has notified the City of Melbourne that he proposes to specify on or about 1st August 1947 that s. 48 of the *Banking Act* shall apply to it.

The validity of the section depends upon the provisions of s. 51 (xiii.) of the Constitution :—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . Banking other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money."

A party whose rights or material interests are not adversely affected by an Act of the Parliament has no right to attack its constitutionality. The prohibition in s. 48 of the *Banking Act* is directed to banks and not to their customers but the Act so operates, having regard to the Treasurer's notice, that the City of Melbourne will be deprived of its right or privilege of dealing with a banker of its own choice. That, I think, is an interest sufficient to support the present action and to make the city a competent plaintiff.

Banking, within the meaning of the Constitution, relates to the business of a banker and covers all those various functions which a banker undertakes. But his main functions appear to be the taking of deposits and current accounts, the issue and payment of bills and cheques drawn on him and the collection of bills and cheques for his customers. In *Hart's Law of Banking*, 4th ed. (1931), vol. 1, pp. 3-5, a banker's functions have been classified under seven heads (and see *Paget* on *The Law of Banking*, 3rd ed. (1922), p. 6). Plenary power is given to the Parliament subject to the Constitution and to the exception contained in s. 51 (xiii.) itself to make laws with respect to the subject matter. Under this power the Parliament may prescribe the rules by which banking is governed. The power extends not only to those regulations which aid, foster and protect banking and the choice of persons engaging in it: it also embraces the making of rules which prohibit it (*Australian Steamships Ltd.* v. *Malcolm* (1); *Huddart Parker Ltd.* v. *The Commonwealth* (2); *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (3); *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (4); *Attorney-General for Canada* v. *Attorney-General for Quebec* (5)). So far, I should think that the provisions of s. 48 may be described as a law with respect to banking. But it is another question whether the Parliament may prohibit a bank from conducting any banking business with a State or an authority of a State including a local governing authority. The Constitution itself excludes State banking which does not extend beyond the limits of the State concerned from the operation of the power. State banking, it was said, means banking with or by a State. It covers, as I understood the argument, not only banking with State banks, that is banks owned or managed by a State government, but also banking transactions or other facilities with banks, other than State banks, of which a State avails itself. At the time the Constitution was passed the only State banks in Australia were Government Savings Banks but since that date other State banks have been constituted. Savings banks do not perform many of the functions of bankers but they fall within the description of bankers in the *Bills of Exchange Act* (*Commissioners of State Savings Bank of Victoria* v. *Permewan, Wright & Co. Ltd.* (6)). Doubtless the limitation upon the banking power had reference to these banks (see *Quick & Garran, The Annotated Constitution of the Australian Commonwealth*, pp. 756-758) but it also covers the State banks which have been subsequently created. The

(1) (1914) 19 C.L.R. 298.
(2) (1931) 44 C.L.R. 492.
(3) (1931) 46 C.L.R. 73.
(4) (1945) 71 C.L.R. 29.
(5) (1947) A.C. 33.
(6) (1914) 19 C.L.R. 457.

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State banking excluded from the banking power relates, in my opinion, to banking operations conducted by banks owned or managed by State Governments or any authority of a State Government and does not extend to transactions or other facilities with banks, other than State banks, of which a State avails itself.

But this leads to the critical question in this case, namely, whether the banking power enables the Parliament to prohibit banks from conducting any banking business for a State or for any authority of a State including a local governing authority. The provision cannot be severed. Local governing authorities are included within the words "a State or any authority of a State." It is, therefore, unnecessary to consider whether the section would be valid if confined to local governing authorities. That question presents some difficulties of its own.

The federal character of the Australian Constitution carries implications of its own. As I have said before, "the government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other" (*South Australia* v. *The Commonwealth* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (2)). The same principle was applied to the dual system of government under the Constitution of the United States of America. "Neither Government may destroy the other nor curtail in any substantial manner the exercise of its powers" (*Metcalf* v. *Mitchell* (3)). But it is interesting to observe the application of this principle both in America and in Australia. It was said by the Supreme Court of the United States to be "an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the National and State Governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system" (*Indian Motocycle Co.* v. *United States* (4), cited by *Butler* J. in his dissenting opinion in *Helvering* v. *Gerhardt* (5)).

(1) (1942) 65 C.L.R. 373, at p. 442.
(2) (1942) 66 C.L.R. 488, at p. 515.
(3) (1926) 269 U.S. 514, at p. 523 [70 Law. Ed. 384, at p. 392].
(4) (1931) 283 U.S. 570, at p. 575 [75 Law. Ed. 1277, at p. 1281].
(5) (1938) 304 U.S. 405, at p. 428 [82 Law. Ed. 1427, at p. 1441].

In Australia the principle was applied in like manner (*D'Emden* v. *Pedder* (1); *Federated Amalgamated Government Railway & Tramway Service Association* v. *N.S.W. Railway Traffic Employees Association* (2)). But in a series of cases in the United States this wide application of the principle has been restricted as may be gathered from such cases as *Helvering* v. *Gerhardt* (3); *Graves* v. *New York*; *Ex rel. O'Keefe* (4); *New York* v. *United States* (5). And likewise in Australia the same wide application of the principle was finally rejected (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.* (6)).

The applications in America of the basic proposition do not, however, present "a completely logical pattern." "But they disclose," said *Stone* J. (subsequently the Chief Justice of the Supreme Court) in *Helvering* v. *Gerhardt* (7), "no purposeful departure from, and indeed, definitely establish, two guiding principles of limitation for holding the tax immunity of State instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of State governments even though the tax be collected from the state Treasury" (See *South Carolina* v. *United States* (8); *Graves* v. *New York*; *Ex rel. O'Keefe* (4); *New York* v. *United States* (5)). "The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the Federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons (*Metcalf* v. *Mitchell* (9); *Willcuts* v. *Bunn* (10))" (11). These are practical considerations rather than juristic principles. But the Supreme Court still recognizes that there are State activities and functions of government that are nevertheless immune. "There

(1) (1904) 1 C.L.R. 91.
(2) (1906) 4 C.L.R. 488.
(3) (1938) 304 U.S. 405 [82 Law. Ed. 1427].
(4) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(5) (1946) 326 U.S. 572 [90 Law. Ed. 326].
(6) (1920) 28 C.L.R. 1.
(7) (1938) 304 U.S., at p. 419 [82 Law. Ed., at pp. 1436, 1437].
(8) (1905) 199 U.S. 437 [50 Law. Ed. 261].
(9) (1926) 269 U.S. 514 [70 Law. Ed. 384].
(10) (1931) 282 U.S. 216 [75 Law. Ed. 304].
(11) (1938) 304 U.S., at p. 419 [82 Law. Ed., at p. 1437].

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are, of course," said *Frankfurter* J. in *New York* v. *United States* (1), " State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse ; only a State can get income by taxing. These could not be included for purposes of Federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." The Court however has " edged away from reliance on a sharp distinction between the ' governmental ' and the ' trading ' activities of a State " (2). And at least some of the learned justices of the Supreme Court of the United States " are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike " (3). For " a Federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government " (4). A non-discriminatory tax in this sense refers " to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual " (see per *Stone* C.J., *Reed*, *Murphy* and *Burton* JJ. (4)).

And the same considerations apply, I apprehend, to interference with federal activities by the States. Immunity, therefore, appears to depend upon practical considerations though the fact that an activity is a trading activity or that legislation is non-discriminatory are relevant though not necessarily decisive considerations.

In Australia the problem has been considered in relation to the importation of goods by the States and immunity of the States from the provisions of the federal customs legislation and duties has been denied. The Constitution gives the exclusive control of duties and customs and excise to the Commonwealth (see ss. 86, 90 and 52) and these provisions control the decisions upon the importation of goods by the States (*R.* v. *Sutton* (*Wire Netting Case*) (5) ; *Attorney-General* (*N.S.W.*) v. *Collector of Customs* (*N.S.W.*) (*Steel Rails Case*) (6)).

(1) (1946) 326 U.S., at p 582 [90 Law. Ed., at p. 333].
(2) (1946) 326 U.S., at p. 580 [90 Law. Ed., at p. 332].
(3) (1946) 326 U.S., at p. 586 [90 Law. Ed., at p. 336].
(4) (1946) 326 U.S., at p. 587 [90 Law Ed., at p. 336].
(5) (1908) 5 C.L.R. 789.
(6) (1908) 5 C.L.R. 818.

The problem has also been considered in relation to the arbitration power in the Constitution and immunity of the States from the provisions of legislation made pursuant to that power has also been denied (*Engineers' Case* (1)). " The doctrine of ' implied prohibition,' " it was said, " finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation in full operation within their respective areas and subject matters, but, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of s. 109 " (2). But " the Court did not say that in interpreting the Constitution no implications of any sort should be made." " Some implications are necessary from the structure of the Constitution itself " (*South Australia* v. *The Commonwealth* (3) ; *Essendon Corporation* v. *Criterion Theatres Ltd.* (4), per *Dixon* J.).

The actual decision in the *Engineers' Case* (1) rests upon the terms of the arbitration power which " necessarily and by reason of the subject matter " extended to all parties, States as well as persons, engaged in industrial disputes extending beyond the limits of any one State (see *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Victoria* (5)).

And again in relation to the defence power the problem has also been considered. The decisions of this Court have so magnified the defence power that it seems almost unlimited (*South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (6) ; *Pidoto* v. *Victoria* (7) ; *Australian Woollen Mills Ltd.* v. *The Commonwealth* (8)). The former decision enabled the Commonwealth to take over the State Income Tax Departments and to make itself, in practice, the sole taxing authority in respect of incomes. It thus, as I think, in abuse of its taxing power, raises considerable sums of money not for the purposes of the Commonwealth (see Constitution, s. 81) but for compensating the States for the loss of their revenues from income tax. The latter decisions enable the Commonwealth, in time of war, to exercise control over the States in relation to all industrial disputes and unrest whatever and to prescribe the conditions of employment and the wages of State employees accordingly.

Still it is said that " the most complete recognition of the power and responsibility of Parliament and of the Government in relation

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 155.
(3) (1942) 65 C.L.R., at p. 447.
(4) *Ante*, p. 1, at p. 22 et seq.
(5) (1942) 66 C.L.R., at p. 515.
(6) (1942) 65 C.L.R. 373.
(7) (1943) 68 C.L.R. 87.
(8) (1944) 69 C.L.R. 476.

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to defence does not involve the conclusion that the defence power is without any limits whatever. The existence of the defence power in the Commonwealth Parliament and the exercise of that power do not mean that all governmental power in Australia may, by the action of the Commonwealth Parliament, be concentrated in Commonwealth authorities. The Constitution cannot be made to disappear because a particular power conferred by the Constitution upon the Commonwealth Parliament is exercised by that Parliament. Indeed, the grant of the power to legislate with respect to defence is made expressly 'subject to this Constitution' —see opening words of s. 51. If, under the defence power, the Commonwealth can control the pay, hours and duties of all State public servants, it is obvious that the Commonwealth can take complete control of all governmental administration within Australia. The result would be the abolition, in all but name, of the Federal system of government which it is the object of the Constitution to establish—preamble and clause 3 of the covering clauses of the Constitution" (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victoria* (1); *Pidoto* v. *Victoria* (2); *South Australia* v. *The Commonwealth* (*Uniform Tax Case*) (3)).

But all this is based upon implications derived from the federal structure of the government established by the Constitution.

So we may start from the proposition that neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or "obviously interfere with one another's operations" (see *Graves* v. *New York*; *Ex rel. O'Keefe* (4)). The American authorities are not controlling nor in many cases safe guides to the interpretation of the Australian Constitution. But I do agree that a distinction between "governmental" or "the primary and inalienable functions of a constitutional Government" (see *Coomber* v. *Justices of Berks* (5)) and the "'trading' activities of a State" is "too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion" (*New York* v. *United States* (6)). When a government acts under its constitutional power then its activities are governmental functions (see *Graves* v. *New York*; *Ex rel. O'Keefe* (7); *Helvering* v. *Gerhardt* (8), per *Black* J.; *New York* v. *United States* (9), *Douglas* J, Part 1, in his dissenting opinion). And I cannot

(1) (1942) 66 C.L.R. 488, at pp. 506-507.
(2) (1943) 68 C.L.R., at p. 106.
(3) (1942) 65 C.L.R., at p. 469.
(4) (1939) 306 U.S. 466 [83 Law. Ed. 927].
(5) (1883) 9 App. Cas. 61, at p. 74.
(6) (1946) 326 U.S., at p. 580 [90 Law. Ed. 332, 333.]
(7) (1939) 306 U.S., at p. 477 [83 Law. Ed., at p. 931].
(8) (1938) 304 U.S., at pp. 426, 427 [82 Law. Ed., at pp. 1440, 1441].
(9) (1946) 326 U.S., at p. 590 [90 Law. Ed. 338].

agree that the presence or absence of discrimination affords a decisive test or legal criterion of constitutional power. As was pointed out in *New York* v. *United States* (1) by *Stone* C.J., *Reed*, *Murphy* and *Burton* JJ., a tax which is not discriminatory " may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." It is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other, depending upon the character and operation of the legislation and executive action thereunder. No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other. The management and control by the States and by local governing authorities of their revenues and funds is a constitutional power of vital importance to them. Their operations depend upon the control of those revenues and funds. And to curtail or interfere with the management of them interferes with their constitutional power. Yet the Commonwealth by its legislation prescribes that, except with the consent in writing of the Treasurer, no bank shall conduct any banking business for a State, including any local governing authority. It operates to prevent the States and local governing authorities from dealing with their old and tried bankers except with the consent in writing of the Treasurer. The object is, of course, to compel the States and the local governing authorities to bank with the Commonwealth Bank, which is a Central Bank. And it was said that the handling of public funds is the appropriate function of a central bank. But that does not establish any constitutional power in the Commonwealth to compel the States so to bank. The States and the local governing authorities, and not the Commonwealth, have the power and the duty of administering, controlling and banking their revenues and funds.

Reliance was placed by the State of South Australia upon the *Audit Acts* of the States. But I do not think they show more than that the administration of the revenues and funds of the States is a matter of great constitutional importance to them and is carefully guarded.

Again the Financial Agreement scheduled to the *Financial Agreement Validation Act* 1929, No. 4 of 1929, and authorized by Constitution, s. 105A, has no bearing, I think, upon the critical question

(1) (1946) 326 U.S., at p. 587 [90 Law Ed., at p. 336].

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in this case though Part I., s. 5, " Borrowing by States," contemplates borrowings from authorities, bodies, funds or institutions (including Savings Banks) constituted or established under Commonwealth or State law or practice.

The provisions of s. 48 of the *Banking Act* 1945 are beyond the constitutional power of the Commonwealth and therefore void.

The demurrer is too large and should therefore be overruled.

Dixon J.

DIXON J. In questions of validity we now usually find it necessary to consider with some care whether the provision impugned is capable of restriction or severance and, if so, whether there is not some severable or restricted part of it which falls within a legislative power and, notwithstanding the invalidity of the rest of the provision, will yet operate to produce some of the intended objects of the whole. But in s. 48 of the *Banking Act* 1945 I do not think there is any difficulty of this kind. Sub-section (1) clearly enough is a single provision which hangs altogether upon its application to the conduct of banking business for a State. Sub-section (3) depends in its turn upon sub-s. (1), and so of course does sub-s. (2). Indeed I did not understand the contrary to be contended. In strictness, however, the issue is with respect to the efficacy of sub-s. (3); for sub-s. (1) does not come into full operation unless and until the Treasurer fixes a date for the purpose, a thing he has not yet done. In the meantime sub-s. (3) gives to sub-s. (1) such partial application as the Treasurer may specify. Sub-section (1) lays upon banks a general prohibition against conducting any banking business for a State, except with the consent in writing of the Treasurer. It does not apply to State banks (s. 5 (1)). It is not clear whether the Commonwealth Bank is or is not comprehended in the prohibition. Upon this point you are left in doubt by the words used in the sub-section and in the definition of " bank " given by s. 4 (1) and in s. 7, upon which the definition turns. On the whole, I think that we should treat s. 48 as inapplicable to the Commonwealth Bank. The *Commonwealth Bank Act* 1945 was passed at the same time and was assented to on the same day as the *Banking Act*. In ss. 49 to 53 and s. 56 of the latter Act the word " bank " is used in contradistinction from the Commonwealth Bank and it seems proper to conclude that the former Act was regarded as the place in which the authority of the Commonwealth Bank to carry on banking business had been completely stated, to the exclusion of s. 7, and therefore of s. 48, of the *Banking Act*.

On this interpretation of the provisions, s. 48 (1) amounts to a prohibition upon banks other than the Commonwealth Bank, and of

course other than State banks, against conducting the banking business for a State or any authority of a State, including a local governing authority, except with the consent of the Commonwealth Treasurer.

The Commonwealth Bank is to act as a central bank, and, in so far as the Commonwealth requires it to do so, it must act as banker and financial agent of the Commonwealth (ss. 11 and 12 of the *Commonwealth Bank Act*).

The purpose of s. 48 may, therefore, be taken to be to complete the concentration of all governmental accounts in the Commonwealth Bank or to carry it as near completion as practical considerations allow, a matter of which the Treasurer is to judge and make exceptions accordingly. Such a purpose accords with the conceptions held of the function of a central bank and with the view that for its fulfilment the central bank should carry the government account so that it may take measures or counter-measures when the necessary financial operations of government might otherwise produce undesired consequences.

Under a unitary constitutional system there is no legal difficulty in giving effect to such a policy or in carrying it as far down the line of public authorities as may be desired. But it is otherwise in a federal system. State and federal governments are separate bodies politic and prima facie each controls its own moneys. To enable the Parliament of the Commonwealth to deny to the States the use of any bank but the central bank of the Commonwealth and thus to guide the collections and disbursements of the States into and through an account of that bank, there must be found in the Constitution a definite legislative power of sufficient amplitude.

The Commonwealth points to s. 51 (xiii.) as containing a power wide enough to authorize s. 48, the power to make laws with respect to banking. No other power was adduced. The long title to the statute describes it as an Act to regulate banking, to make provision for the protection of the currency and of the public credit of the Commonwealth and for other purposes. But, even if s. 48 may be conceived to contribute to any of these further purposes, it was as a law with respect to banking that it was supported, and I do not see how it could be justified under any other power.

The question for our decision, therefore, is whether in the exercise of the power to make laws with respect to banking, other than State banking, the incorporation of banks and the issue of paper money, the Commonwealth Parliament may forbid banks, except the Commonwealth Bank and State banks, to conduct any banking business for a State save by the consent of the Federal Treasurer.

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The power should be given an ample meaning and a wide operation and the exception in favour of State banking should, in my opinion, be understood as referring to the operations of a banker conducted by or on behalf of a State and not to the State as the customer of a bank.

The purpose of the exception was, I have no doubt, to ensure that State banks should not be affected by any law which the Parliament of the Commonwealth might make about banking and that the exclusive power to regulate them should remain with the States.

The form of par. (xiii.) presents a curious point in its express mention of the incorporation of banks as an extension of or addition to the subject of banking and in its failure to attach the exception of State banking to the extension or addition. But, whatever its significance or effect, it is not a point that touches the question before us.

The exception of State banking means that a general law of the Commonwealth governing the business of banking cannot affect the operations of a State bank within the State concerned. The express inclusion in the federal legislative power of State banking extending beyond the limits of the State concerned gives added point to the exception. For it shows that State banking was contemplated as a possible function of government which should be excluded from the operation of federal law within the territorial limits of the authority of the government concerned.

This Court has adopted a rule of construction with reference to the application to the States of the specific powers conferred by the Constitution upon the Parliament of the Commonwealth. It is a prima-facie rule of construction and its operation may be displaced by sufficient indications of a contrary intention whether found in the nature or subject matter of the power, in the manner in which it is expressed, in the context or elsewhere in the Constitution.

The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the *Engineers' Case* (1) stripped of embellishment and reduced to the form of a legal proposition. It is subject, however, to certain reservations and this also I have repeatedly said. Two reservations, that relating to the prerogative and that relating to the taxation power, do not enter into the determination of this case and nothing need be said about them. It is, however, upon the third that, in my opinion, this case turns. The reservation relates to the use of

(1) (1920) 28 C.L.R. 129.

federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers. In support of such a use of power the *Engineers' Case* (1) has nothing to say. Legislation of that nature discloses an immediate object of controlling the State in the course which otherwise the Executive Government of the State might adopt, if that Government were left free to exercise its authority. The control may be attempted in connection with a matter falling within the enumerated subjects of federal legislative power. But it does not follow that the connection with the matter brings a law aimed at controlling in some particular the State's exercise of its executive power within the true ambit of the Commonwealth legislative power. Such a law wears two aspects. In one aspect the matter with respect to which it is enacted is the restriction of State action, the prescribing of the course which the Executive Government of the State must take or the limiting of the courses available to it. As the operation of such a law is to place a particular burden or disability upon the State in that aspect it may correctly be described as a law for the restriction of State action in the field chosen. That is a direct operation of the law.

In the other aspect, the law is connected with a subject of Commonwealth power. Conceivably that connection may be made so insubstantial, tenuous or distant by the character of the control or restriction the law seeks to impose upon State action that it ought not to be regarded as enacted with respect to the specified matter falling within the Commonwealth power. If so, the law fails simply because it cannot be described as made with respect to the requisite subject matter. But, if in its second aspect the law operates directly upon a matter forming an actual part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the simple ground of irrelevance to a head of power. Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law. In the United States much

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use has been made in this way of the postal power and of the commerce power to legislate in a way calculated to vindicate morality or achieve a social purpose rather than to advance the postal services or promote or regulate inter-state commerce as such. When this is done the result is that laws confined to an existing head of federal power nevertheless reach as a matter of purpose into fields lying under State legislative authority. But it is one thing to say that a federal law may be valid notwithstanding a purpose of achieving some result which lies directly within the undefined area of power reserved to the States. It is altogether another thing to apply the same doctrine to a use of federal power for a purpose of restricting or burdening the State in the exercise of its constitutional powers. The one involves no more than a distinction between the subject of a power and the policy which causes its exercise. The other brings into question the independence from federal control of the State in the discharge of its functions.

In the case of most legislative powers assigned to the Commonwealth some ingenuity would be needed to base a law squarely upon the subject matter of the power and at the same time effect by it a restriction or control of the State in respect of some exercise of its executive authority or for that matter in respect of the working of the judiciary or of the legislature of a State. The difficulty of using most federal powers in that way arises from the character of the subjects of the powers. It is, for instance, difficult to see how any law based on the power with respect to lighthouses, astronomical observations, fisheries, weights and measures, bills of exchange or marriage could be aimed at controlling States in the execution of their functions. But to attempt to burden the exercise of State functions by means of the power to tax needs no ingenuity, and that, no doubt, is why that power occupies such a conspicuous place in the long history both in the United States and here of the question how far federal power may be used to interfere with the States in the exercise of their powers. The doctrine that no exercise of the tax power by Congress could work an interference with State government functions was formerly pushed to extravagant lengths. It was applied artificially to notional and abstract interferences, and, moreover, this led to the making of untenable distinctions. The Supreme Court has now reconsidered the older doctrine. The notion of a reciprocal immunity from which it arose has been condemned as fallacious and the constitutional law of the United States now gives as little countenance to the extreme applications made of the principle of non-interference as does the constitutional law of Australia. But, having cleared much of the ground formerly occupied by this doctrine,

the Supreme Court has encountered some difficulty in formulating a test by which the validity of a federal tax falling upon operations of the States may be determined. All agree, however, that a tax cannot be laid on the States " as such," that a State cannot be singled out for taxation or for a special burden of taxation in respect of acts or things when others are not taxed or are not so burdened in respect of the same acts or things, in other words, that a taxing law discriminating against a State is unconstitutional and void.

There are problems which this principle may not cover, but into them I need not go. They are discussed in *New York* v. *United States* (1), the various opinions in which will repay study.

What is important is the firm adherence to the principle that the federal power of taxation will not support a law which places a special burden upon the States. They cannot be singled out and taxed as States in respect of some exercise of their functions. Such a tax is aimed at the States and is an attempt to use federal power to burden or, may be, to control State action. The objection to the use of federal power to single out States and place upon them special burdens or disabilities does not spring from the nature of the power of taxation. The character of the power lends point to the objection but it does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies to other powers, if under them the States are made the objects of special burdens or disabilities. Not of course all powers, for some of them are concerned with the States specially or contemplate some measure in particular relation to a State. Examples can be seen in pars. (xxxi.), (xxxii.), (xxxiii.), and (xxxiv.) of s. 51. The meaning and nature of the power cannot be left out of account. Of this the defence power is a conspicuous example. But plainly the greater number of powers contemplate legislation of general application.

I do not think that either under the Constitution of the United States or *The British North America Act* or the Commonwealth Constitution has countenance been given to the notion that the legislative powers of one government in the system can be used in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise, notwithstanding the complete overthrow of the general doctrine of reciprocal immunity of government agencies and the discrediting of the reasoning used in its justification. For that reason the distinction has been constantly drawn between a law of general application and a provision singling out governments and placing special burdens

(1) (1946) 326 U.S. 572 [90 Law. Ed. 326].

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upon the exercise of powers or the fulfilment of functions constitutionally belonging to them. It is but a consequence of the conception upon which the Constitution is framed. The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss. 51, 52, 107, 108 and 109.

In the many years of debate over the restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent exercise of the functions of the one or the other, it has often been said that political rather than legal considerations provide the ground of which the restraint is the consequence. The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.

A truism that has been invoked is that the possibility that a power may be abused is no reason for restricting the power by construction. Doubtless it formed a proper objection to the view now completely discredited that an agency of one government was not in that character amenable in any degree to a power of the other lest some exercise of the power might interfere with the due performance of the functions of the agency. But as an objection it is not in point where the question is whether an actual attempt to restrict or control the State in the exercise of a function forming part of its executive power is or is not permitted by the Constitution.

The considerations I have just mentioned have been used in relation to the question what the federal Government may do with reference to the States and the question of what a State may do with reference to the federal Government. But these are two quite different questions and they are affected by considerations that are not the same. The position of the federal government is necessarily

stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth.

These two considerations add great strength to the implication protecting the Commonwealth from the operation of State laws affecting the exercise of federal power. But they also amplify the field protected. Further, they limit the claim of the States to protection from the exercise of Commonwealth power. For the attempt to read s. 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic. Accordingly the considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions. But, to my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is, in my opinion, to be plainly seen in the very frame of the Constitution.

So far I have stated my opinion in an abstract and a general form and in this there is no little danger. For the subject has no vocabulary of technical terms possessing a precise and settled connotation and the use of expressions of indefinite and variable meaning is unavoidable. But the ground is by no means new and my purpose is but to indicate the principles to which I adhere, before proceeding to apply them to s. 48 of the *Banking Act* 1945.

In *New York* v. *United States* (1) *Frankfurter* J. said: "One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract." The actual decision of the present case can be no wider than the constituent factors contained in s. 48 require, however widely the principles which lead to it may be stated.

The factors in s. 48 which in my view govern the question of its validity are these. Its operation is confined to States and authorities of States including, of course, local governing authorities. It is based upon the existence of the banks mentioned in the first schedule of the *Banking Act* as well as the Commonwealth Bank and possibly of other banks and the section assumes that, but for the provisions it contains, the States and their authorities would, like other bodies

(1) (1946) 326 U.S., at p. 575 [90 Law. Ed., at p. 329].

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and individuals, be at liberty freely to choose amongst them. The duty to choose a bank or banks for the purpose of the banking business of a State in fact belongs to the Treasurer of the State, as the *Audit Acts* of the States show.

In these conditions s. 48 forbids the banks to do the business of the States unless the Treasurer of the Commonwealth consents. Section 5 of the *Crimes Act* 1914-1941 operates to make the Treasurer and any subordinate officer of the State guilty of the same offence as the bank if they should procure the bank to disregard the prohibition.

There is thus a law directly operating to deny to the States banking facilities open to others, and so to discriminate against the States or to impose a disability upon them. The circumstance that the primary prohibition is laid upon the banks and not upon the States does not appear to me to be a material distinction. It is just as effectual to deny to the States the use of the banks and that is its object. This I think is not justified by the power to make laws with respect to banking.

I cannot see that it is to the point to argue that under s. 51 (xiii.) the Commonwealth might give the Commonwealth Bank a monopoly complete, except for State banks, and that what s. 48 does is to give a monopoly restricted to State business. That is only to say that instead of establishing a monopoly with all its advantages and disadvantages shared by the whole community, States have been singled out and deprived of the freedom of choice which the existing system afforded.

At bottom the principle upon which the States become subject to Commonwealth laws is that when a State avails itself of any part of the established organization of the Australian community it must take it as it finds it. Except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established. If there be a monopoly in banking lawfully established by the Commonwealth, the State must put up with it.

But it is the contrary of this principle to attempt to isolate the State from the general system, deny it the choice of the machinery the system provides and so place it under a particular disability. Whether the right to exercise such a choice is of great or of small importance to the States is not a material matter for inquiry. It is enough that it forms part of the functions of the Executive Government of the States in administering the finances of the States.

It may be conceded that the Financial Agreement under s. 105A of the Constitution and the adoption of the system of uniform taxation of incomes place the finances of the States in a very different

position from that which they occupied when the Commonwealth was first established. Further, these measures may well be supposed to lend such a provision as s. 48 the appearance of a corollary, at all events from the point of view of a central bank. But these are considerations that cannot affect the interpretation of s. 51 (xiii.). Section 105A cuts across the Constitution and, as it has been construed in this Court, imposes upon the States absolute liabilities to the Commonwealth enforceable against the revenues of the States. Extensions of constitutional power or supremacy may explain, but they do not justify, further extensions.

In my opinion s. 48 of the *Banking Act* is void because an inseverable part of it is directed to control or restrict the Executive Government of the States in the use of banks for the conduct of their banking business.

The demurrer should be overruled.

McTiernan J. It is necessary to decide the question whether s. 48 of the *Banking Act* 1945, an Act of the Commonwealth Parliament, is within any of its specific powers, which are enumerated in s. 51 of the Constitution.

I am of opinion that the submission made by counsel for the Commonwealth and the Treasurer that s. 48 is within s. 51 (xiii.), one of those powers, is correct.

Section 48 is in these terms :—

" (1) Except with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority.

Penalty : One thousand pounds.

(2) Any consent of the Treasurer under this section may apply to all such business conducted by any particular bank or at a particular office of a bank, or to the business of any particular State or authority conducted by any particular bank or at a particular office of a bank.

(3) Until a date fixed by the Treasurer by notice published in the *Gazette*, this section shall apply only in relation to banking business conducted for a State or for an authority of a State, including local governing authority, specified by the Treasurer by notice in writing, and, if an office of a bank is specified in the notice, at the office so specified."

Section 51 (xiii.) provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to—" Banking, other than State banking ; also State banking extending beyond

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the limits of the State concerned, the incorporation of banks and the issue of paper money."

Section 48 is addressed to banks: but its effect is to deprive the States of their power under State law to select banks with which to conduct their banking business.

Although the section has this effect it is a valid law if it is within the power and is not contrary to any provision of the Commonwealth Constitution.

The only words in the Constitution which cut down the meaning of "banking" are the words of the exception in s. 51 (xiii.), "other than State banking."

The expression "State banking" does not include "banking business conducted for a State," which is the subject of s. 48. The expression means banking conducted by a State. The word "State" signifies the State as banker, not as customer. This is the ordinary meaning of the expression "State banking." The words "also State banking extending beyond the limits of the State concerned" refer to the ramifications of a State bank's business beyond the borders of the State to which the bank belongs: those words show that State banking means banking carried on as an enterprise of a State of the Commonwealth. In the *Engineers' Case* (1), *Higgins* J. gave this meaning to the expression "State banking" (2).

The word "banking" in its ordinary and natural meaning covers banking business conducted by a bank either for a government or private customers. As the banking transactions conducted by a bank for a State are not within the exception, "other than State banking," they are included in the subject "Banking," with respect to which the Parliament is authorized to make laws.

It would be contrary to ordinary rules of construction, and it would not be a legal interpretation of the Constitution, to imply an exception of those transactions in addition to the express exception of State banking, from the legislative power. It is evident from the language of s. 51 (xiii.) that it includes power to make laws binding on the States, except to the extent that the power is negatived by the words "other than State banking." This view was taken in the *Engineers' Case* (1), where observations were made about s. 51 (xiii.): See the report (3).

The nature of the legislative power provides no reason for excluding the States from it. In this connection, there is no *discrimen* which enables the Court to distinguish this legislative power from others which obviously include power to make laws binding the States and

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 162.
(3) (1920) 28 C.L.R., at pp. 158, 162, 166.

affecting their activities. Examples are " Trade and Commerce "—s. 51 (i.) : " Currency, Coinage and legal tender "—s. 51 (xii.) : " Weights and Measures "—s. 51 (xv.) : " Bankruptcy and Insolvency "—s. 51 (xvii.) : " Patents "—s. 51 (xviii.).

For example in *Attorney-General* (*N.S.W.*) v. *Collector of Customs* (*N.S.W.*) (1), it was held that the States were bound by the grant of the " Trade and Commerce " power. *Griffith* C.J. said that this power " necessarily involves the power to interfere with the operations of the State Governments so far as to make effectual any condition or prohibition imposed by the Commonwealth upon importation " (2). The conclusion reached in that case was approved in the *Engineers' Case* (3) ; and it called forth this comment, which was made in the reasons for judgment: " A more drastic interference than that case sanctions can hardly be imagined. It was an insistence on money being applied from the State Treasury for the purposes of the Commonwealth Treasury as a condition of the State being allowed to import steel rails from abroad for use on its railways. Some difference of opinion occurred as to the nature of the duty, but none as to the primary validity of the interference." (4).

Referring to the power conferred by s. 51 (xvii.), *Higgins* J. said in the *Engineers' Case* (5) : " Suppose that under the common law—or under express State legislation—the Crown has priority over all other creditors, it is argued that a federal law as to bankruptcy, enacting that Crown debts are to be paid *pari passu* with other debts, would not bind the State ! " His Honour refuted the limitation of power involved in the supposition.

The States are not even totally exempt from laws made under the " Taxation " power, s. 51 (ii.). In *South Australia* v. *The Commonwealth* (6), it was decided by four justices that the Commonwealth Parliament was authorized by that power to pass s. 31 of the *Income Tax Assessment Act* 1942. That is the crucial enactment in the plan for uniform taxation. The section says that a taxpayer shall not pay any tax imposed by State law on the income of any year in respect of which tax is imposed by federal law until the taxpayer has paid the federal tax or has received from the Commonwealth Commissioner of Taxation a certificate notifying him that the tax is no longer payable.

These are instances of Commonwealth Acts which interfered with the States. I cannot think that it is a graver interference with the States to prohibit a bank from conducting any banking business for

(1) (1908) 5 C.L.R. 818.
(2) (1908) 5 C.L.R., at p. 833.
(3) (1920) 28 C.L.R. 129.
(4) (1920) 28 C.L.R., at pp. 158-159.
(5) (1920) 28 C.L.R. at p. 164.
(6) (1942) 65 C.L.R. 373.

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a State unless the bank has the consent of the Commonwealth Treasurer to do so.

Section 48 does not apply to the Commonwealth Bank, or to any State bank. The Commonwealth Bank is the central bank or central reserve bank of Australia. It is also authorized to conduct general banking business. None of the banks to which s. 48 applies is a central bank. The banks to which it applies are private trading banks.

Section 12 of the *Commonwealth Bank Act* 1945 provides :—" The Commonwealth Bank shall, in so far as the Commonwealth requires it to do so, act as banker and financial agent of the Commonwealth."

The effect of s. 48 is that the Treasurer of the Commonwealth is able, by declining to give any consent under the section, to tie the States and the authorities mentioned in it, to the Commonwealth Bank if they are unwilling to make their banking arrangements with a State bank.

It was sought to show by reference to ss. 8 and 9 of the *Commonwealth Bank Act* 1945 that the result of placing the States in that position might be Commonwealth control of State expenditure. Whatever the bank, the limits of a State's accommodation would not be always fixed by its own desires. But the vice attributed to s. 48 is that it is an interference by the Commonwealth with the States, and that the interference is inconsistent with the federal structure of the Constitution. The answer to that contention is that no implication of a restriction upon the exercise of Commonwealth legislative power is permissible if it is " formed on a vague, individual conception of the spirit of the compact " and is " not the result of interpreting any specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution "—*Engineers' Case* (1). If s. 48 is within s. 51 (xiii.) and is not contrary to any express provision of the Constitution, it is valid even if it interferes with the freedom of the States to select bankers and arrange loans or overdrafts, and it could be used as a fulcrum to compel a State to adjust its financial programme to Commonwealth financial policy. There is no implied prohibition against the exercise of the power granted by s. 51 (xiii.), to its fullest extent, that being ascertained by ordinary rules of construction.

In the *Engineers' Case* (2), there is this statement—" But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. It may be taken into account by the parties when creating the powers, and they, by omission of suggested powers or by safeguards introduced by them

(1) (1920) 28 C.L.R., at p. 145. (2) (1920) 28 C.L.R., at p. 151.

into the compact, may delimit the powers created. But, once the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language naturally understood may be abused."

It is obvious from the language of s. 51 (xiii.) that it includes power to make laws affecting the States.

Section 48 compels a bank to which it applies to have the Treasurer's consent before it may transact banking business for a State or certain other public bodies. Section 7 compels the bank to be in possession of an authority granted by the Governor-General before it may transact banking business in Australia for any body at all. The bank is compelled to be in possession of the latter authority and the Treasurer's consent before it may conduct any banking business for the States and the other public bodies. There is no attack upon s. 7 : this section interferes with the freedom which a State has under its own law to select its banker. It limits the range of choice to banks which are licensed. If the right of the States to make arrangements for the conduct of their banking business without interference by Commonwealth law is saved by the Constitution, then s. 7 is open to much of the criticism directed against s. 48. Section 7 affects all bank customers, including States : s. 48 is limited to States and State authorities and local government authorities. If s. 48 is bad but s. 7 is good, the invalidating circumstances must be, not merely that s. 48 is an interference with the States, but that it makes the conduct of banking business for States and local government authorities subject to a condition that does not apply to the conduct of banking business for other customers.

It would be an illusory protection of State rights to ascertain the permitted limits of Commonwealth legislative power by a rule which would not authorize a law which applies only to the States but would authorize the law if it bound the States and everybody else indiscriminately.

Section 31 of the *Income Tax Assessment Act* 1942 is in form addressed to a taxpayer : but notwithstanding the form, the section interferes with the States, just as s. 48, although in form addressed to a bank, interferes with the States. Leaving aside the State authorities and local government authorities, the States only are affected by the command which s. 48 addresses to the banks, just as the States only are affected by the command which s. 31 addresses to the taxpayers. The latter section virtually destroys the power of the States to collect revenue by imposing income tax. The section was held to be valid because it is within an enumerated or

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specific power, as the Court held, and is not contrary to any express provision of the Constitution. Section 48 interferes with the exercise of the power which each State had under its own State law to make such banking arrangements, as it thinks fit, for State purposes. The decision of the question whether it is void or not is governed by the same principles as that upon which s. 31 was upheld. It is valid if it is within one of the enumerated powers and is not contrary to any express provision of the Constitution.

The American decisions are not authorities where the question is whether the Commonwealth Parliament is competent to pass a law touching the activities of the States. In the *Engineers' Case* (1) there is a warning against using the American decisions to decide a question of that nature. The warning is in these terms—" But it is plain that, in view of the two features of common and indivisible sovereignty and responsible government, no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country."

In that case the Court departed from the principles in those decisions and enunciated a principle for the interpretation of the Commonwealth Constitution. The principle is stated in these terms : " The Act 63 & 64 Vict. c. 12, establishing the Federal Constitution of Australia, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation. It may be that even if s. V. of the Act 63 & 64 Vict. c. 12 had not been enacted, the force of s. 51 of the Constitution itself would have bound the Crown in right of a State so far as any law validly made under it purported to affect the Crown in that right ; but, however that may be, it is clear to us that in presence of both s. V. of the Act and s. 51 of the Constitution that result must follow. The Commonwealth Constitution as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States—in other words, bind both Crown and subjects. The grant of legislative power to the Commonwealth is, under the doctrine of *Hodge* v. *The Queen* (2), and within the prescribed

(1) (1920) 28 C.L.R., at p. 148.

(2) (1883) 9 App. Cas. 117, at p. 132.

limits of area and subject matter, the grant of an 'authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow,' a doctrine affirmed and applied in a remarkable degree in *Attorney-General for Canada* v. *Cain* (1). 'The nature and principles of legislation' (to employ the words of Lord *Selborne* in *R.* v. *Burah* (2)), the nature of dominion self-government and the decisions just cited entirely preclude, in our opinion, an *a priori* contention that the grant of legislative power to the Commonwealth Parliament as representing the will of the whole of the people of all the States of Australia should not bind within the geographical area of the Commonwealth and within the limits of the enumerated powers, ascertained by the ordinary process of construction, the States and their agencies as representing separate sections of the territory. These considerations establish that the extent to which the Crown, considered in relation to the Empire or to the Commonwealth or to the States, is bound by any law within the granted authority of the Parliament, depends on the indication which the law gives of intention to bind the Crown. It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution" (3).

It has been said that the banks to which s. 48 applies are private trading banks: and that the Commonwealth Bank is given the functions of a central bank. A central banking system is set up by the *Commonwealth Bank Act* 1945 and the *Banking Act* 1945: See Parts III. and VII. of the former Act and Part II., Division 3, of the latter Act.

In a central banking system, the central bank regulates the volume of credit "and the trading banks are responsible for distributing that credit amongst different industries": s. 166, Report of the Australian Royal Commission on Banking (1937).

This specialization of functions may make it necessary to limit the powers of the trading banks. It is, I apprehend, a reason for the control which s. 48 places upon the trading banks. "But the efficient operation of a central banking system requires some limitation upon the powers of the trading banks in the general interest of the community. It may be in the interest of any trading bank, influenced by considerations of profit and liquidity, to expand or

(1) (1906) A.C. 542, at p. 547.
(2) (1878) 3 App. Cas. 889, at p. 904.
(3) (1920) 28 C.L.R., at pp. 152-154.

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contract credit at a time when the general interest requires different action": s. 532 of the above-mentioned Report. The expansion or contraction of government credit by the trading banks could more than anything else upset any regulation of credit made by the central bank.

In s. 164 of the Report it is said that the volume of credit would be affected "by the trading banks allowing their ratios to vary within wide limits." Other factors affecting the volume of credit are also mentioned. The relation between the central bank and "the governments" is stressed in s. 581 of the report as a very important factor in determining whether the central bank has adequate power to change the policy of the trading banks in the matter of the expansion or contraction of credit.

In s. 143 of the Report it is stated: "From 1912 the Commonwealth Bank held the Commonwealth Government account, and by 1920 those of most of the States. By doing so the Bank was better able to avoid the dislocations which might be associated with large government operations in the money markets and with any lag of revenue behind expenditure."

Sir Ernest Musgrave Harvey, Deputy Governor of the Bank of England, said in the course of the evidence which he gave to the Committee on Finance and Industry: "Then another function which I think it is essential should be performed by the Central Bank is that it should conduct the main banking business of the State." He proceeded to point out that the State collects and distributes vast sums and that "the incidence of the receipts and the payments of the State is necessarily unevenly distributed." He also said that unless the central bank was the banker for the "State" there could be "violent oscillations of credit which would create great disturbances in the value of money from day to day." The advantage of the "State" having the central bank as its banker was summed up by Sir Ernest Harvey in these words: "If, however, the" (banking) "arrangements" (of the State) "are entrusted to the Central Bank, the Central Bank has notice beforehand exactly as to the amounts which have to be provided. It can lay its plans to ensure that the State shall have the funds it requires, and moreover, that when those funds have been distributed they may be re-absorbed in an orderly and gradual manner without causing undue disturbance, and without leaving a flood of suddenly manufactured credit to disturb the value of money and possibly the value of the monetary unit measured internationally." The word "State" in this evidence applies to a State in the general sense of the term. Sir Ernest Harvey's evidence, in principle, applies both to Commonwealth and State financial operations.

The report of the Committee is in accordance with the evidence which Sir Ernest Harvey gave on the relation of a central bank to the government and the necessity of its being the government's banker: "In practice the tasks which have been imposed upon the Central Bank make it imperative that it should hold the account of the Government, for the financial operations of Government are conducted on a scale so great as seriously to derange the money market unless special measures are taken to counteract the inconveniences which result from the inflow of revenue or the temporary easiness which results from interest and dividend payments. This task ought to devolve upon the Central Bank in virtue of its general function as guardian of the money market, and does in fact devolve upon it when it carries the Government account."

In *Central Banking*, a work by *M. H. De Kock*, Deputy Governor of the South African Reserve Bank, it is said at p. 64: "Central banks everywhere operate as bankers to the State, not only because it may be more convenient and economical to the State, but also because of the intimate connection between public finance and monetary affairs. The State is the largest receiver of revenue and the biggest disburser of expenditure in any country, while the central bank is charged with the duty and responsibility of controlling or adjusting credit in the national economic interest. As the manifold financial activities of the State can easily interfere with money-market conditions and exchange rates and with the credit policy of the central bank, the banking operations of the State can best be centralised in the central bank." This author said at p. 63: "In many countries the central bank keeps the accounts not only of the Central or Federal Government, but also of the Provinces or States."

It is a reasonable conclusion to draw from the views of these authorities about public finance and government banking business and their possible effects on the stability of credit and the value of money, that the transactions which a Government needs to have with a bank in order to carry on its financial operations, is a special branch of banking business, and that a trading bank is not a suitable bank to conduct those operations in a country where there is a central bank. All the reasons given by these authorities why the central bank should conduct the main banking business of the government apply to the banking business of the Australian States and of State authorities and local government authorities in Australia. The finances of all these bodies are public finances: their financial operations may be all classed as government financial operations. They receive and expend vast revenues and expend very large amounts of borrowed money. The receipts and expenditure of the States and the bodies

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mentioned in s. 48 constitute a very large proportion of the public finance of this country.

It follows from the view that the banking transactions of a government are a particular branch of banking, suitable to be conducted by a central bank, rather than a trading bank, that s. 48 is a law for regulating the conduct of particular banking transactions and that the substance of the law is not a regulation of the States or the other authorities mentioned in the section. The subject of the section is the banking business which it describes.

The contention is made that s. 48 discriminates against the States or is aimed at the States.

If discrimination is fatal to a federal law, it would be necessary to define its meaning and to examine the limits of the power under which it would be claimed that the law was passed.

The contention misses the principle upon which the section is founded. Section 48 contains a complete category of banking business which is proper to a central bank, rather than a trading bank. Section 48 gives power to the Treasurer, if recourse is not had to State Banks, to secure that the banking business included in the category will be diverted to the central bank when it is expedient to do so. The selection of the banks and the banking business to which the section applies is founded upon banking considerations which are in accordance with views widely, if not universally, held as to the proper division of business between the central bank of a country and its trading banks. Section 48 introduces a control over the trading banks' acceptance of government banking business which has the object of enabling the central bank to exercise its functions effectively. I am of opinion that s. 48 is in substance a law with respect to the subject of banking and is within the legislative power contained in s. 51 (xiii.) of the Constitution.

Section 48 does not infringe upon any right reserved to the States by any provision of the Constitution.

In regard to s. 107 of the Constitution, it is said in the *Engineers' Case* (1): "But it is a fundamental and fatal error to read s. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in s. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated."

Section 5 of Part I. of the Financial Agreement provides in the last paragraph: "Notwithstanding anything contained in this Agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, or may, subject to maximum limits (if any) decided upon by the

(1) (1920) 28 C.L.R., at p. 154.

Loan Council from time to time for interest, brokerage, discount, and other charges, borrow money for temporary purposes by way of overdraft, or fixed, special, or other deposit, and the provisions of this Agreement other than this paragraph shall not apply to such moneys."

Sub-section (5) of s. 105A of the Constitution, which authorizes the making of the Financial Agreement, says that every agreement made under the section shall be binding upon the Commonwealth and the States who are parties to it "notwithstanding anything contained in this Constitution." The rest of the sub-section is not material at present. The provisions of s. 5 of Part I. of the Financial Agreement are therefore binding on the Commonwealth, notwithstanding anything contained in the Constitution. The borrowing of money by overdraft signifies a transaction between a State and a bank: and a State may borrow from a bank by any of the other means mentioned in the provision of the agreement. It stipulates the means whereby a State may borrow: but it does not give the State a constitutional right to approach any banker from whom a State might have got an overdraft when the agreement was made. The provision prescribes the means by which a State may borrow: it has nothing to say about the bank from which the State is given leave to borrow. Section 48 does not eliminate all banks: it does not defeat or impair the right which is given by the provision of the Financial Agreement to borrow for temporary purposes.

In s. 133 of the Report of the Australian Royal Commission to which I have referred, this statement is made about borrowing by the States by means of overdraft, for temporary purposes: "In October, 1929, treasury-bills were issued in Australia instead of a public loan, but at the end of the year a total of £2.5 m. was outstanding. In December, 1930, this sum had increased to £9 m. At a conference between the Commonwealth Bank and the trading banks in that month it was decided that future banking accommodation to the Governments should be provided only by treasury-bills issued under the authority of the Loan Council. Both Commonwealth and State Governments had previously borrowed money for temporary purposes by means of overdrafts either from the Commonwealth Bank or from trading banks. To the banks which held them, treasury-bills at this time were merely short-term government securities, but in June, 1931, a step was taken which altered their significance for the trading banks. In accordance with the Premiers' Plan, government deficits continued to be financed by treasury-bills . . . At this date, (30th June 1931) the balance outstanding amounted to £20.6 m."

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The emphasis which was laid in argument on the right of a State to put its revenue in any bank it pleases, overlooks the substantial matter that a government has recourse to a bank to finance its operations because revenue lags behind expenditure and there is a need to borrow money on a large scale for public works. A State could look after its cash without the assistance of a bank. When the nature and incidence of the financial operations of a government are considered the examples of hypothetical federal laws which were given in argument in order to impugn s. 48 appear to be irrelevant. One example was a law forbidding a bank to conduct banking business for a brewery without the licence of the Treasurer. I do not know of any expression of an opinion that it is a function of a central bank to conduct not only the banking business of governments but also of breweries. There is no point in the example. The reasons which justify s. 48 have no application to the banking business of a brewery. The other example of a hypothetical law was a law forbidding banks to transact any banking business for the members of a prescribed religious denomination without the Treasurer's consent. Membership of the religious denomination does not place the banking transactions of persons who belong to the denomination in any sensible category of banking. The law might well be regarded as a law for the persecution of the members of the denomination because of their religious belief rather than a law for the regulation of a branch of banking.

For these reasons, I am of opinion that the demurrer should be allowed.

WILLIAMS J. The questions raised upon the argument of the demurrer and the material sections of the *Banking Act* 1945, and in particular s. 48, have been fully set out in the preceding judgments, and I shall not repeat them. The first question is whether s. 48 of the *Banking Act* is legislation with respect to State banking within the meaning of the exception in s. 51 (xiii.) of the Constitution. The origin of the placitum is s. 91 (15) of *The British North America Act* 1867, which gives the Parliament of Canada exclusive legislative authority over " banking, the incorporation of banks, and the issue of paper money." The additional words " other than State banking, also State banking extending beyond the limits of the State concerned " have been incorporated in the placitum. In *Tennant* v. *Union Bank of Canada* (1), Lord *Watson*, in delivering the judgment of the Privy Council, said that banking is " an expression which is

(1) (1894) A.C. 31, at p. 46.

wide enough to embrace every transaction coming within the legitimate business of a banker." This statement was recently repeated by Lord *Porter* in delivering the judgment of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Quebec* (1). These citations show, if authority is needed, that the legislation authorized by the placitum is legislation with respect to the business of banking. The bodies which engage in the business of banking are the banks. It would not be an ordinary use of language to say that the customers of the banks engage in such a business. The customers carry on some other business of their own, and it is the business of the banks to provide one form of facility which enables their customers to carry on such businesses. The States would not be concerned (that is, interested) in any real sense in the business of banking other than in the business of banks which were their agencies. There would be no reason why the States as customers of independent banks should not be subject to general laws made by the Commonwealth Parliament relating to the conduct of banking business. There would be even less reason why, if the States as customers were not subject to such laws in the case of accounts in their own territories, they should not also be exempt in respect of accounts which they opened in other States when those other States as customers were exempt within their own territorial limits. In my opinion the expression " State banking " in the placitum does not refer to the States as mere customers of banks, but to banks constituted and controlled by the States.

The second question is whether s. 48 is legislation with respect to banking within the ambit of placitum (xiii.). The Banking Act controls the right to carry on the business of banking in Australia by providing that—(1) a person other than a body corporate shall not, at any time after the expiration of six months from the commencement of Part II., carry on any banking business in Australia (s. 6) ; (2) a body corporate shall not, after the expiration of the same period, carry on any banking business in Australia unless it is in possession of an authority in writing granted by the Governor-General to carry on banking business, but the Governor-General shall, within seven days after the commencement of Part II., grant to each body corporate specified in the First Schedule an authority to carry on such business (ss. 7 and 8) ; (3) bodies corporate which are authorized to carry on banking business in Australia cannot carry on such business for a State or any authority of a State, including a local governing authority, except with the consent in writing of the Treasurer (s. 48). The First Schedule consists of two

(1) (1947) A.C. 33, at pp. 41, 42.

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parts, the first containing the names of fourteen incorporated banks, compendiously known as the private trading banks, and the second the names of the Hobart Savings Bank and Launceston Bank for Savings. The *Commonwealth Bank Act* 1945 was assented to on the same date as the *Banking Act*. Section 17 of the former Act provides that the Commonwealth Bank *shall* carry on general banking business. This is a specific provision relating to the Commonwealth Bank which, in my opinion, relieves the Commonwealth Bank, which is under a duty to carry on general banking business, from the necessity of obtaining any further authority to do so under s. 7 of the *Banking Act*. Accordingly, the existing banks to which s. 48 applies are those enumerated in the First Schedule to that Act.

While s. 48 in form prohibits private trading banks from conducting business with the States and their authorities without the consent of the Treasurer, its pith, substance, effect and operation is to compel the States and their authorities to bank either with a State Bank or with the Commonwealth Bank. The express exception of State banking in placitum (xiii.) prevents the Commonwealth directing the States not to bank with State banks. The purpose of s. 48 is therefore to give the Commonwealth Bank as complete a monopoly as possible of the business of the States and their authorities as customers of banks. If the Commonwealth can say to the States and their authorities that they shall not bank with the private trading banks, it can equally say that they shall not bank with the Commonwealth Bank or with any State bank if and in so far as it extends beyond the limits of the State concerned, and thereby prohibit the States and their authorities from resorting to any bank other than a State bank, and then only in respect of business within the State concerned. The receipt, custody and payment of the public moneys of a State is an essential governmental function of that State. The *Audit Acts* of the States, to several of which we were referred, authorize the Treasurers of the States to make agreements with such banks as they may think fit for these purposes. But s. 48 of the *Banking Act* seeks to empower the Treasurer of the Commonwealth to override the *Audit Acts* of the States and to impose his will upon the Treasurers of the States as to the banks with which the States may do business.

I must give effect to the principles for the construction of the Constitution laid down in the *Engineers' Case* (1). It is pointed out that " Laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States—in other words,

(1) (1920) 28 C.L.R. 129.

bind both Crown and subject " (1). But the Parliament of the Commonwealth is only authorized by s. 51 to make laws with respect to the enumerated subjects (1) for the peace, order and good government of the Commonwealth, and (2) subject to the Constitution, and there arises from the very nature of the federal compact, which contemplates two independent political organisms, each supreme within its own sphere, existing side by side and exerting divided authority over the same persons and in the same territory, a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions. Therefore a federal law which purports to bind the States must be examined to ascertain whether it is really a law for the peace, order and good government of the Commonwealth with respect to one of the enumerated subjects, or a law which, under colour of such a purpose, is really a law the purpose of which is to interfere with such functions. As the Privy Council has pointed out in relation to the Canadian Constitution in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), each case must be determined as it arises for " no general test applicable to all cases can safely be laid down." *Dixon* J. has pointed out in *West's Case* (3) that there are two reservations to the principle laid down in the *Engineers' Case* (4) that the powers of the Parliament of the Commonwealth under s. 51 must be construed as extending to the States. " The first reservation is that in the *Engineers' Case* (4) the question was left open whether the principle would warrant legislation affecting the exercise of a prerogative of the Crown in right of the States. The second is that the decision does not appear to deal with or affect the question whether the Parliament is authorized to enact legislation discriminating against the States or their agencies."

Section 48 is legislation which clearly discriminates against the States and their agencies. We were not asked, and I would not be prepared, to hold that legislation which conforms to the language of a placitum is necessarily invalid if it discriminate against a State or States. Many emergencies could arise which would justify the Commonwealth enacting legislation under the defence power during hostilities which would discriminate against a State or States. But the presence of discrimination points strongly to the law being aimed at the States, and if the law is in pith and substance a law which seeks to give directions to the States as to the manner in which they shall exercise their executive, legislative or judicial governmental

(1) (1920) 28 C.L.R. 129, at p. 153.
(2) (1939) A.C. 117, at p. 129.
(3) (1937) 56 C.L.R., at p. 682.
(4) (1920) 28 C.L.R. 129.

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functions it is not a law for the peace, order and good government of the Commonwealth, but an unlawful intervention in the constitutional affairs of the States.

Three recent cases in this Court relating to the exercise of the defence power during hostilities illustrate the operation of the principle. In the *Uniform Tax Case* (1), the *Income Tax (Wartime Arrangements) Act* 1942 was held to be valid by the majority of the Court. That Act in form discriminated against the States because it conscripted into the service of the Commonwealth the taxation staffs of the States and acquired for the Commonwealth the offices in which the State Income Tax Departments were carried on. The purpose of the Act was to create a Commonwealth Income Tax Department to collect taxation levied by the Commonwealth, a large part of which was required to prosecute the war. The loss of the services of these staffs and possession of these premises by the States was likely to hinder the carrying on of the governmental functions of the States, but this hindrance was of the same character as the disturbance which was being caused to all sorts of businesses from the Commonwealth having to conscript employees holding important positions in such businesses and to take possession of convenient premises in which they were being carried on in order to prosecute the war. There was nothing in the Act which attempted to prevent the States from utilizing the services of other officers less experienced, and securing other premises less convenient to carry on the same governmental functions. The convenience of the States, like that of individuals, had to give way to the overriding necessity of the prosecution of the war. In *Victoria* v. *The Commonwealth* (2), and *Victoria* v. *Foster* (3), on the other hand, where the Commonwealth sought to direct the States as to the remuneration, holidays and hours of work of public servants who were not conscripted by the Commonwealth, but continued to be employed by the States upon work relating to the essential governmental functions of the States, the legislation was held to be beyond the ambit of the defence power and therefore invalid.

The effect of s. 48 is to deprive the States and their authorities of the use of banking facilities available to the general public. Its purpose is to give to the Treasurer of the Commonwealth the power to dictate to the States where they shall bank their public moneys. It is plainly in pith and substance legislation aimed at giving directions to the States as to the manner in which they shall exercise part of what the Privy Council has called in *James* v. *The Commonwealth* (4);

(1) (1942) 65 C.L.R. 373.
(2) (1942) 66 C.L.R. 488.
(3) (1944) 68 C.L.R. 485.
(4) (1936) A.C. 578, at p. 611.

and in *Abitibi Power & Paper Co.* v. *The Montreal Trust Company* (1), their sovereign powers.

The extent to which the legislation encroaches upon such sovereign powers is well illustrated by the provision of the Financial Agreement referred to by the Chief Justice, which gives the States an overriding constitutional right flowing from s. 105A of the Constitution to borrow moneys for temporary purposes by way of overdraft. Prior to 1929, when s. 105A was inserted in the Constitution, the States had the same right as ordinary members of the public to approach any banks carrying on a general banking business to arrange overdrafts. It was obviously intended by the Financial Agreement that this right should be preserved to the States, subject only to the limitations contained in the provision itself.

It might be contended that s. 48 only infringes the provision in question to the extent to which it seeks to prohibit the States arranging such overdrafts with the banks enumerated in the First Schedule to the *Banking Act*. But overdrafts are not granted in gross. The essence of an overdraft is that the indebtedness of the customer to the bank is not fixed, but fluctuates from time to time within the agreed limit as moneys are paid in and drawn out of an active current account operated upon in the ordinary course of the business of the customer. The Financial Agreement therefore plainly contemplates and intends that the States shall have the right to become ordinary customers of any banks carrying on a general banking business.

For these reasons I am of opinion that s. 48 is unconstitutional and invalid and that the demurrer should be overruled.

Demurrer overruled with costs. Declare that s. 48 *of the Banking Act* 1945 *is void. Defendants to pay costs of action.*

Solicitor for the plaintiff: *T. C. Trumble.*

Solicitor for the defendants: *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

Solicitors for the interveners: *A. J. Hannan,* Crown Solicitor for South Australia; *P. G. B. d'Arcy,* Crown Solicitor for Western Australia; *F. G. Menzies,* Crown Solicitor for Victoria.

E. F. H.

(1) (1943) A.C. 536, at p. 547.